Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

MATRIX COMMUNICATIONS CORPORATION,

Petitioner,

vs.

MCI TELECOMMUNICATIONS CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether under the Federal Arbitration Act and this Court's precedent in *Commonwealth Coatings Corp. v. Continental Gas Co.*, 393 U.S. 145 (1968) and its progeny, a party can be forced by its telecommunication carrier to arbitrate using an arbitration provider which has a separate concealed agreement with the carrier by which the carrier grants substantial payments, perks and other benefits to the arbitration provider that were never disclosed to the other party.

2. Whether a carrier's failure to disclose in its tariff a concealed agreement with its arbitration provider, in violation of the filed tariff doctrine and the Federal Communications Act, nullifies any agreement by a third party to arbitrate its disputes with the carrier pursuant to the carrier's tariff.

3. Whether a carrier can force a party to arbitrate the carrier's willful misconduct when the carrier's tariff itself nullifies any requirement to arbitrate such willful misconduct.

4. Whether one of the world's largest telecommunication carriers can utilize its tariff to force a small company to arbitrate under rules that deny the company its statutory rights and remedies under the Communications Act, in contravention of the decision of the Ninth Circuit in *Graham Oil Co. v. ARCO Products, Inc.*, 43 F.3d 1244 (9th Cir. 1995).

PARTIES TO THE PROCEEDINGS

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MCI Telecommunications Corporation v. Matrix Communications Corporation, No. 96-11975-PBS, United States District Court, District of Massachusetts, March 27, 1997, unpublished.

MCI Telecommunications Corporation v. Matrix Communications Corporation, No. 96-11975-EFH, United States District Court, District of Massachusetts, October 10, 1996, unpublished.

JURISDICTION

Matrix seeks review of the opinion of the First Circuit Court of Appeals rendered on January 27, 1998. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

47 U.S.C. § 203(a) (1995)

47 C.F.R. § 61.2 (1997)

47 C.F.R. § 61.54(j) (1997)

47 C.F.R. § 61.74(a) (1997)

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47 C.F.R. § 41.21 (1997)

47 U.S.C. § 414 (1995)

47 U.S.C. § 415 (1995)

STATEMENT OF THE CASE

On June 18, 1996, Matrix Communications Corporation ("Matrix") brought suit against MCI in Massachusetts state court. MCI Telecommunications, Corp. ("MCI") removed the case to federal court on June 21, 1996. On July 11, 1996, MCI filed a Motion to Stay and Compel Arbitration of the Matrix Lawsuit. On September 13, 1996, Matrix filed its First Amended Complaint in five counts.

On September 27, 1996, the District Court heard MCI's Motion to Stay and Compel Arbitration. The District Court made no ruling at the hearing and within a few hours after the conclusion of the hearing Matrix dismissed its lawsuit without prejudice under Fed. R. Civ. P. 41(a)(1)(i). (App. 31-33, 35, 36).

On September 30, 1996, Matrix forwarded a limited Notice of Claim to J.A.M.S./Endispute ("JAMS"), the arbitration group designated by MCI in its Tariff, requesting the arbitrator to decide whether Matrix could receive in its arbitration all the relief it sought in its First Amended Complaint. (App. 37-41). At the time of submitting its Notice of Claim, Matrix did not know there was

an agreement between MCI and JAMS not disclosed in the MCI Tariff which covered how arbitrations are handled for MCI by JAMS.

On October 2, 1996, MCI filed suit in federal court to compel arbitration of the claims Matrix had set forth in its First Amended Complaint. Eight days later on October 10, 1996, prior to Matrix filing any responsive pleadings, the District Court entered an Order compelling Matrix to arbitrate its claims in front of JAMS. (App. 24-26).

On November 15, 1996, Matrix learned for the first time that there was an agreement between MCI and JAMS which was not disclosed in the MCI Tariff. MCI and JAMS refused to turn over the concealed MCI/JAMS Agreement to Matrix until January 8, 1997. Based on the contents of that concealed Agreement, Matrix, on February 4, 1997, filed its motion under Fed. R. Civ. P. 60(b) for relief from the Order compelling arbitration. On March 27, 1997, the District Court denied the Rule 60(b) Motion. (App. 27-30). Matrix filed a timely notice of appeal from the Rule 60(b) Motion. Both appeals were consolidated and on January 27, 1998, the Court of Appeals for the First Circuit affirmed the judgments. (App. 1-23).

STATEMENT OF FACTS

MCI is a "common carrier" within the meaning of the Communications Act of 1934 ("Communications Act"). *See* 47 U.S.C. § 203(a) (1995). (App. 136). Section 203 of the Communications Act requires MCI, as well as all other carriers, to fully and completely disclose in its

publicly filed tariff all of MCI's rates and all the rules and regulations affecting those rates. *Pay Phone Concepts, Inc. v. MCI Telecommunications Corp.*, 904 F. Supp. 1202, 1207 (D. Kan. 1995). In addition, Title 47 of the Code of Federal Regulations explicitly requires that the MCI Tariff be a comprehensive and exhaustive document which comprises the exclusive body of materials which bear on the rates and regulations found in the MCI Tariff. (*For e.g., see* 47 C.F.R §§ 61.2,[1] 61.54(j),[2] and 61.74[3] (1997)).

In February 1994, MCI amended the MCI Tariff to include an arbitration provision at Rules and Regulations B-7.13 entitled "Arbitration of disputes" ("MCI Tariff Arbitration Provision (B-7.13)") (App. 100) which provides for the arbitration of customer payment disputes of

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[1] Section 61.2 of Title 47 of the Code of Federal Regulations states that "[i]n order to remove all doubt as to their proper application, all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations."

[2] Section 61.54(j) of Title 47 of the Code of Federal Regulations states that "the general rules, regulations, exceptions, and conditions which govern the tariff must be stated clearly and definitely" and "[a]ll general rules, regulations, exceptions, and conditions which in any way affect the rates named in the tariff must be specified."

[3] Section 61.74 of Title 47 of the Code of Federal Regulations states that "no tariff publication filed with the Commission may make reference to any other tariff publication or any other document or instrument."

invoices issued after February 28, 1994 for charges totaling $10,000.00 and above.[4]

On June 23, 1994, MCI entered into an agreement with JAMS ("MCI/JAMS Agreement") which sets forth the terms and conditions under which JAMS would arbitrate MCI customer payment disputes for charges totaling $10,000.00 and above. (A. JAMS Agreement). JAMS is a for profit corporation that has shareholders who act as arbitrators of disputes. As shareholders, these arbitrators share in the profits of JAMS. When MCI amended the MCI Tariff to include the MCI Tariff Arbitration Provision (B-7.13), MCI failed to disclose in the MCI Tariff or to otherwise disclose to the FCC, MCI's customers, or parties opposing MCI in arbitration, the MCI/JAMS Agreement and the full nature and scope of MCI's relationship with JAMS.

In rendering its decision, the Court of Appeals for the First Circuit found that the MCI/JAMS Agreement "include[s] matters unquestionably of interest and concern to parties contracting to arbitrate with MCI." *MCI Telecommunications Corp. v. Matrix Communications Corp.*, 135 F.3d 27, 35 (1st Cir. 1998).

The MCI/JAMS Agreement requires MCI to provide JAMS the following payments and perks which are not disclosed in the MCI Tariff, and not disclosed to the FCC, MCI's customers, or parties opposing MCI in arbitration:

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[4] The MCI Tariff was amended by MCI on one day's notice to the Federal Communications Commission ("FCC") to include the MCI Tariff Arbitration Provision (B-7.13) and the lawfulness MCI Tariff Arbitration Provision (B-7.13) has never been determined by the FCC.

(a) Over $280,000 paid to date to JAMS by MCI. Section XVB;

(b) $60,000 a year paid to JAMS by MCI. Section XVB;

(c) Financial incentives to JAMS when it asserts jurisdiction over an MCI case. Section XVBS;

(d) Free long distance service for JAMS paid by MCI. Section XV-A;

(e) Free dedicated phone lines for JAMS paid by MCI. Section XV-A;

(f) Free MCI 800 numbers and toll free service for JAMS paid by MCI. Section XV-A;

(g) Free MCI E-Mail account for JAMS paid by MCI. Section XV-A;

(h) Guarantee of payment to JAMS by MCI if customers do not pay charges in connection with the arbitration. Section XV-B4; and

(i) MCI agrees to indemnify and hold JAMS harmless from third party claims including negligence and willful misconduct. Section XX.

In addition to the undisclosed payments and perks provided by MCI to JAMS, the MCI/JAMS Agreement calls for MCI and JAMS to exchange and evaluate information regarding the content and status of arbitrations on a daily basis without notice or reference to the interests, rights, or access of parties opposing MCI in arbitration and in a manner that precludes FCC oversight. In this regard, the MCI/JAMS Agreement requires JAMS to be available to MCI's Office of General Counsel at all times

(Section V-C3), requires JAMS to refer to MCI's Office of General Counsel all inquiries made to JAMS by customers of MCI concerning such issues as settlements, billing practices and past due balances (Section V-D4), and arbitrators received special training and instructions (Section XII-B) which includes instructions prohibiting the arbitrators from issuing findings of fact and conclusions of law (X11-E). The issuance of findings of fact or conclusions of law would constitute a breach of the MCI/JAMS Agreement, for which MCI reserves the right to terminate JAMS on ten days' notice (Section XII-C).

The MCI/JAMS Agreement also specifically requires that JAMS provide *ex parte* to MCI the following information:

(a) Quarterly reports containing an analysis of settlements. (Section XI);

(b) Weekly reports on the next major event to occur in each arbitration and the current status of each arbitration available only to MCI. (Section X);

(c) Twenty-four hour electronic docketing system available only to MCI containing any change in the status of the case, deadlines that MCI must meet and any decisions that affect what the parties must do. (Section VII);

(d) A centralized case scheduling system available only to MCI. (Sections IV-C and VI);

(e) Twenty-four hour on-line case information service available only to MCI. (Sections IV-E and IX); and

(f) Telephonic information service available only to MCI. (Section IV-F).

These significant benefits and information exchanged between MCI and JAMS were never disclosed in the MCI Tariff and never disclosed to the FCC, or MCI's customers and never granted to parties opposing MCI in arbitration.

On July 1, 1994, just eight days after execution of the MCI/JAMS Agreement, MCI published the MCI Arbitration Rule Book, which states that "[JAMS] ("the Administrator") is an independent and neutral provider of arbitration services" and that the Administrator and the arbitrator are bound by the Code of Ethics for Arbitrators in Commercial Disputes. This Code of Ethics requires disclosure, at the outset of the arbitration, of the nature and extent of any relationship that the arbitrator has with any party to the arbitration. MCI also published a Guide to its Arbitration Rules for parties arbitrating with MCI. Neither the MCI Arbitration Rule Book nor the Guide, like the MCI Tariff, disclosed the MCI/JAMS Agreement or the extensive relationship of JAMS with MCI.

During the weeks of negotiating their Agreement, MCI did not advise Matrix of the existence of the MCI/JAMS Agreement and Matrix was not aware of the MCI/JAMS Agreement.

On August 7, 1995, in the midst of MCI and Matrix negotiating their Agreement, MCI had its counsel present a paper at the 1995 Annual meeting of the American Bar Association concerning MCI Tariff arbitrations entitled "ARBITRATION OF CUSTOMER DISPUTES: THE MCI APPROACH". This paper states that "[t]he customers right to bring statutory or federal causes of actions are

expressly preserved," "[n]ot all [d]isputes between MCI and Consumers are subject to [b]inding [a]rbitration" and that "[d]isputes concerning issues other than the amount of the invoice [are not] required by the tariff to be resolved by binding arbitration." (App. 115-135). This paper also does not make any reference to the existence of the MCI/JAMS Agreement or the extensive relationship of JAMS with MCI.

On September 22, 1995, Matrix and MCI entered into an Agreement ("October 1995 Agreement") (App. 42-61) for Matrix to sell MCI long distance services on a commission basis. Prior to and on the very day that Matrix executed the October 1995 Agreement, Matrix inquired about the MCI Tariff Arbitration Provision (B-7.13) referenced in the proposed Agreement and MCI informed Matrix that the arbitration provision was limited in scope and application to customer billing disputes that did not involve Matrix. At this time, MCI did not disclose to Matrix the MCI/JAMS Agreement. (App. 62-93). MCI terminated the October 1995 Agreement eight months later, in June 1996, to avoid paying substantial commissions it owed to Matrix. The Matrix Lawsuit which followed was in five counts all of which alleged willful misconduct on the part of MCI.

On November 15, 1996, after inquiry by counsel for Matrix, JAMS acknowledged for the first time the existence of the MCI/JAMS Agreement, but refused to turn over that Agreement to Matrix and instead advised Matrix that it would have to subpoena that Agreement from MCI. Thereafter, MCI refused to turn over the MCI/JAMS Agreement unless counsel for Matrix agreed not to disclose it to anyone including Matrix's co-counsel in this

matter, Matrix itself, the District Court and the Court of Appeals. Matrix refused to agree to these terms.

The JAMS arbitrator thereafter entered an Order that the MCI/JAMS Agreement was to be held in confidence by Matrix. A month later at a conference with the arbitrator on January 8, 1997, MCI gave counsel for Matrix a copy of the twenty-two page, single-spaced MCI/JAMS Agreement. This was the first time Matrix or its counsel had ever seen the MCI/JAMS Agreement or knew of its contents.

The JAMS arbitrator also ruled that although Matrix's claims were arbitrable, certain significant statutory relief sought by Matrix, including multiple damages and attorney's fees, were unavailable and would not be granted in the arbitration because he interpreted that the MCI Tariff barred such relief.

ARGUMENT ON REASONS FOR ALLOWANCE OF THE WRIT

This Court in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 479 (1989) in considering the Federal Arbitration Act held that "arbitration under the Act is a matter of consent, not coercion . . . ". The facts in this case are not in dispute, namely that MCI failed to disclose to Matrix (or in its publicly filed tariff) the MCI/JAMS Agreement, which concerns and affects the arbitration of disputes governed by the MCI Tariff. The First Circuit found that the undisclosed MCI/JAMS Agreement "include[s] matters

unquestionably of interest and concern to parties contracting with MCI." *MCI v. Matrix*, 135 F.3d at 35. Since the MCI/JAMS Agreement was undisclosed and "includes matters unquestionably of interest and concern to parties contracting with MCI" there cannot be any valid consent on the part of Matrix to waive its constitutional right to trial by jury. By failing to disclose the MCI/JAMS Agreement in its publicly filed tariff, MCI's knowingly and willfully violated the tariff filing requirements of the Communications Act, thereby rendering the MCI Tariff Arbitration Provision (B-7.13) unlawful and unenforceable.

The MCI Tariff itself specifically enunciated that willful misconduct on the part of MCI takes this case outside of arbitration. In rendering its decision, the First Circuit failed and refused to apply the long standing principle that the liability of a common carrier for willful misconduct cannot be limited by its own tariff.

Finally, in rendering its decision, the First Circuit refused to follow the decision by the Ninth Circuit Court of Appeals in *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir. 1995), which held that a large company, like MCI, could not impose, as a condition of doing business with it, contractual provisions that deprived a smaller company of its statutory rights and remedies.

A.

MCI's failure to disclose its concealed agreement with JAMS nullifies any waiver by Matrix of its Constitutional right to a trial by jury

This case deals with a party being denied its constitutional right to a trial by jury (a right that is reaffirmed by

the Communications Act), based on an arbitration provision in MCI's publicly filed tariff. MCI's demand for arbitration and the First Circuit's decision compelling arbitration "[are] of necessity, predicated on the tariff", *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 582 (1981). The decision by the First Circuit must, therefore, be reversed because MCI knowingly and willfully failed to disclose, in its publicly filed tariff and otherwise, a side agreement with the arbitration provider selected by MCI to arbitrate its customer disputes.

The relinquishment of the constitutional right to a jury trial is a matter of grave significance. Before Matrix could make a knowing waiver of its right to a jury trial, Matrix had to be afforded full disclosure of the relationship between MCI and JAMS. A fundamental underpinning of the arbitration system is the neutrality of the arbitration process, and in order to determine the neutrality of the arbitration process, full disclosure of the dealings of the arbitration service with one or more of the involved litigants is essential. This necessity for complete impartiality was firmly established by the United States Supreme Court in *Commonwealth Coatings Corp. v. Continental Gas Co.*, 393 U.S. 145 (1968). As agreed by contract, the parties each appointed an arbitrator, who in turn selected a third arbitrator. *Id.* at 146. This third arbitrator had business dealings with the prime contractor "involving fees of about $12,000 over a period of four or five years," although there had been no contact during the year preceding the arbitration. *Id.* This business relationship was not revealed to the subcontractor and for that reason the subcontractor sought to have the arbitration award in favor of the sureties set aside. *Id.* This Court

held that the award must be vacated, declaring that arbitrators are required to disclose "any dealings that might create an impression of possible bias," *id.* at 149, and that the arbitrator's failure to disclose his business relationship with one of the parties was a "manifest violation of the strict morality and fairness Congress would have expected on the part of the arbitrator and the other party in the case." *Id.* at 147. Writing for the Court, Mr. Justice Black recognized the heightened scrutiny that arbitrators should face in determining their impartiality, even more so than courts:

> [W]e should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.

Id. at 149, 150.

. . .

> This rule of arbitration and this canon of judicial ethics rest on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias. We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another.

Id.

In this case, the substantial perks and undisclosed payments that JAMS has received from MCI are over 20 times more than what the Supreme Court in *Commonwealth Coatings, supra,* found so offensive to the arbitration process.

The necessity for action by this Court is all the more compelling because the JAMS arbitrators share in the profits of JAMS and clearly the substantial dollars paid to JAMS by MCI and MCI's illegal refunding to JAMS all costs associated with its telephone services add considerably to the financial well being of JAMS and thereby inure to the personal financial benefit of the JAMS arbitrators. Furthermore, under each individual arbitrator's agreement with JAMS, they are exclusively bound to JAMS to provide all their arbitration and mediation services to JAMS and thus all their professional income is derived from JAMS. In speaking to this issue, this Court in *Commonwealth Coatings, supra,* referenced with approval and cited *Tumey v. State of Ohio,* 273 U.S. 510 (1927) and held that a decision should be set aside where there is even "the slightest pecuniary interest" on the part of the judge, and specifically rejected the State's contention that the compensation involved there was "so small that it is not to be regarded as likely to influence improperly a judicial officer in the discharge of his duty . . . ". 393 U.S. at 148. This Court went on to hold that "[s]ince in the case of courts this is a constitutional principle, we can see no basis for refusing to find the same concept in the broad statutory language that governs arbitration proceedings . . . ." *Id.* In order to uphold the integrity of the arbitration system promoted by Congress, summary reversal by this Court has been found to be appropriate

where, as here, "the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Mireles v. Waco*, 502 U.S. 9, 15 (1991) (Scalia, J., dissenting). Alternatively, the Court should grant certiorari and order full briefing and argument.

In *Sanko S.S. Co. v. Cook Industries*, 495 F.2d 1260 (2d Cir. 1973), the Second Circuit noted that "[w]here dealings might 'create an impression of possible bias,' they must be disclosed. Indeed, it seems to us that the better practice is that arbitrators should disclose fully all their relationships with the parties, whether these ties be of a direct or indirect nature, even if some unnecessary disclosure may occur." Utilizing the standard set in *Sanko*, it is undisputable that JAMS has "ties of a direct nature" to MCI and, at the very least, JAMS' arbitrators have "ties of an indirect nature" to MCI. MCI had an obligation to provide a full disclosure of its relationship with JAMS prior to Matrix executing the October 1995 Agreement. MCI's failure to do so renders the arbitration provision unenforceable.

The gravity of this nondisclosure is all the more graphic and alarming since there was no way for Matrix to learn of the undisclosed agreement between JAMS and MCI when one considers that:

a) Section 61.74 of the Code of Federal Regulations specifically provides that the MCI Tariff must be an all encompassing document and may not reference any other documents. Thus, there would be no basis for Matrix to think there would be an agreement between MCI and JAMS since its existence would violate the Code of Federal Regulations.

b) Section 203 of the Communications Act requires that the MCI Tariff be an all encompassing document that is posted and kept in an open place for inspection. Thus, there would be no reason for Matrix to think there would be an agreement between MCI and JAMS whose existence would be "unlawful" under the terms of the Communications Act.

c) The Code of Ethics of Arbitrators in Commercial Disputes requires such an agreement be disclosed.

d) MCI in its paper to the ABA did not disclose the existence of the MCI/JAMS Agreement.

In addition the undisclosed payments and perks granted to JAMS by MCI violate the following laws, statutes and regulations:

(a) Section 201 and Section 202 of the Communications Act prohibiting the preferential treatment with regard to communication services that JAMS is receiving from MCI (App. 137-139);

(b) Section 203 of the Communications Act prohibiting JAMS from receiving free communication services from MCI;

(c) Section 210 of the Communications Act prohibiting MCI from providing free communication services to JAMS (App. 140);

(d) Section 41.21 of the Code of Federal Regulations, prohibiting free communication services to JAMS in excess of $50 in any calendar year (App. 140);

(e) Rule B-4.02 of the MCI Tariff prohibiting "willful misconduct" by MCI;

(f) Section 203 of the Communication Act, prohibiting MCI from not disclosing the MCI/JAMS Agreement in MCI's publicly filed tariff;

(g) Code of Ethics for Arbitrators of Commercial Disputes, prohibiting agreements such as the MCI/JAMS Agreement from being concealed from a party opposing MCI in arbitration; and

(h) The Federal Arbitration Act, 9 U.S.C. §§ 1-14, prohibiting agreements such as the MCI/JAMS Agreement from being concealed from a party opposing MCI in arbitration.

It is unreasonable to expect Matrix to assume that JAMS and MCI would have a concealed agreement that violates four major provisions of the Communications Act, the Federal Arbitration Act, the Code of Federal Regulations, the Code of Ethics for Arbitrators in Commercial Disputes and the MCI Tariff itself. MCI decided not to disclose to Matrix or anyone else its Agreement with JAMS because no reasonable person being aware of such an agreement and such a close tie between JAMS and MCI would ever agree to arbitrate its dispute with MCI using JAMS.

The decisions of this Court for nearly a century hold, contrary to the decision by the First Circuit, that a federally regulated carrier's filed tariff must fully disclose not only the rates, but also the rules and regulations because the tariff exclusively "governs the legal relationship between [customer] and carrier," and "[t]he rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." *Maislin Industries,*

U.S. v. Primary Steel, Inc., 497 U.S. 116, 126, 130 (1990). These same principles were applied eighty-six years ago by this Court in *Chicago & Alton v. Kirby*, 225 U.S. 155 (1912).

MCI, by its Tariff, was required to disclose the MCI/JAMS Agreement and the full nature and scope of it relationship with JAMS precisely because the rules and regulations of the tariff "are conclusive as to the rights of the parties." *Atchison Topeka & Santa Fe Railway Co. v. Robinson*, 233 U.S. 173, 180 (1914). This Court further held in *Western Union Telegraph Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 572 (1921) that the purpose of the tariff is to "represent the whole duty and the whole liability of the company. It cannot be varied by agreement" particularly an undisclosed agreement like the MCI/JAMS Agreement. This is especially true since § 61.74 of Title 47 of the Code of Federal Regulations requires tariffs to be all encompassing documents and prohibits references in tariffs to any other documents.

As early as sixty-five years ago the Seventh Circuit in holding that an untariffed agreement was "void" stated that "[i]n our judgment this question has been so definitely settled by the Supreme Court that its further discussion by us would be quite superfluous." *Consumers' Mutual Oil Co. v. Schaff*, 59 F.2d 730, 731 (7th Cir. 1932). The issue of MCI's failure to disclose the MCI/JAMS Agreement is so well settled that this Court should declare the MCI/JAMS Agreement void and unlawful and the MCI arbitration provision unlawful and unenforceable.

Given the fact that the hallmark of arbitration providers, such as JAMS, is that they are above even the appearance of partiality, *Commonwealth Coatings*, 393 U.S. at 145, it is incomprehensible that an undisclosed agreement would exist between MCI and JAMS much less an agreement in which there are substantial undisclosed payments and perks made by MCI to JAMS and *ex parte* communications between MCI and JAMS.

B.

MCI's failure to disclose the MCI/JAMS Agreement, in its publicly filed tariff, violates the tariff filing requirements and renders the MCI Tariff Arbitration Provision unlawful and unenforceable

In a case involving this same respondent, this Court held that "the tariff-filing requirement is . . . the heart of the common-carrier section of the Communications Act" and is the "essential characteristic of a rate-regulated industry." *MCI Telecommunications Corp. v. American Telephone and Telegraph Co.*, 512 U.S. 218, 229-31 (1994). The tariff filing requirements of the Communications Act "embodies the policy which has been adopted by Congress to prevent unjust discrimination" in common carrier services. *Louisville and Nashville R.R. v. Maxwell*, 237 U.S. 95, 97 (1915); *Thurston Motor Lines, Inc. v. Jordan K. Rend, Ltd.*, 460 U.S. 533, 535 (1983).

The tariff filing requirements also promote equity and national uniformity by ensuring that all similarly situated customers are entitled to pay the same tariffed rates, receive the same tariffed service, and have the same federal remedies if the carrier violates the tariff or the substantive requirements of the Communications Act. *See*

Maislin, 497 U.S. at 126-31; *see also MCI Telecommunications Corp.*, 512 U.S. at 230. In addition, the tariff filing requirements operate as a barrier against the use of side agreements by the carriers, like the MCI/JAMS Agreement. *Atchison*, 233 U.S. at 180-81.

MCI knowingly and willfully violated the tariff filing requirements of the Communications Act and a multitude of other laws, statutes, and regulations by failing to disclose the MCI/JAMS Agreement in its publicly filed tariff. Unless reversed the decision by the First Circuit will have consequences which are profoundly adverse not only to enforcement of the Communications Act and the regulation of the entire telecommunications industry, but "across the spectrum of regulated utilities" such as electric power, natural gas, and railroad transportation. *Arkansas Louisiana Gas*, 453 U.S. at 577.

For over a hundred years and three times in the last fifteen years alone, this Court has reaffirmed and enforced the tariff filing requirements where federal agencies or courts have failed to do so. *Thurston Motor Lines*, 460 U.S. at 533; *MCI Telecommunications Corp.*, 512 U.S. at 218; and *Maislin*, 497 U.S. at 116.

Despite its own findings that the MCI/JAMS Agreement was undisclosed and "includes matters unquestionably of interest and concern to parties contracting with MCI" and notwithstanding over a hundred years of well-settled precedents of this Court, and the uniform decisions of other courts of appeals, the First Circuit failed and refused to enforce tariff filing requirements in this case by choosing to allow the MCI Tariff Arbitration Provision (B-7.13) to remain in force and effect as the

law.[5] This Court should, therefore, grant certiorari and reverse the First Circuit's opinion summarily.

C.

Under The MCI Tariff The Willful Misconduct Of MCI Nullifies Any Obligation Of Matrix To Arbitrate.

Rule B-4.02 of the MCI Tariff, entitled "Liability", states that "MCI's liability for willful misconduct, if established as a result of judicial or administrative proceedings, is not limited by this tariff." (App. 94). Rule B-4.02 of the MCI Tariff is thus a reaffirmation of the fact that for over a century carriers have been prohibited from utilizing their respective tariffs to limit their liability for claims based on willful misconduct. *Primrose v. Western Union Telegraph Co.*, 154 U.S. 1 (1894). The attempt by the First Circuit in its opinion to ignore the express language in the MCI Tariff, that conduct involving "willful misconduct" is not limited by the tariff and is not arbitrable, contravenes over 100 years of law on this issue and thus cannot stand.

Paragraph 22 of the October 1995 Agreement states that "[a]ny dispute relating to this Agreement shall be submitted for binding arbitration in accordance with the rules contained in MCI Tariff FCC No. 1." There is no

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[5] "[F]ederal Tariffs are the law, not mere contracts." *Pay Phone Concepts, Inc. v. MCI*, 904 F. Supp. 1202 (D. Kan. 1995). *See also MCI Telecommunications Corp. v. Graham*, 7 F.3d 477, 479 (6th Cir. 1993); *MCI Telecommunications Corp. v. Garden State Investment Corp.*, 981 F.2d 385, 387 (8th Cir. 1992); and *American Tel. & Tel. Co. v. Florida-Tex Freight, Inc.*, 357 F. Supp. 977, 979 (S.D. Fla 1973).

reference in paragraph 22 to a particular section of the MCI Tariff and, thus, when considering the MCI Tariff all "the rules contained in MCI Tariff FCC No. 1" must be considered. *MCI Telecommunications Corp. v. TCI Mail, Inc.*, 772 F. Supp. 64 (D.R.I. 1991). In particular Rule B-4.02 of the MCI Tariff must be considered which states any "willful misconduct" by MCI is not arbitrable and is beyond the arbitration requirements of the MCI Tariff.

Matrix's First Amended Complaint was in five counts and all five counts are replete with numerous documented allegations of "willful misconduct" on the part of MCI toward Matrix. By such willful misconduct MCI violated the Massachusetts Deceptive Practice Act (Sec. 93A) and the Lanham Act and engaged in common law fraud and deceit due to the fact that, *inter alia*, MCI willfully a) terminated the October 1995 Agreement without any basis; b) failed to make any commission payments to Matrix; c) failed to provide long distance services to customers brought to MCI by Matrix; d) repeatedly overbilled such customers; and e) terminated customers without any basis when they refused to pay the overcharged amounts.

Under the express terms of the MCI Tariff, MCI's liability to Matrix for "willful misconduct" is not limited in any way by the MCI Tariff. Matrix, therefore, has an absolute right to proceed in Court under its First Amended Complaint. This precise issue was decided in the case of *MCI v. TCI Mail, supra*, which is a case directly involving Respondent and its Tariff wherein the Court stated:

> By its own terms, the MCI Tariff does not limit MCI's liability if judicial or administrative

> proceedings establish that MCI committed "willful misconduct." MCI Tariff, section B, Para. 4.02, 9th Revised Page 10. Viewing the pleadings in the light most favorable to TCI, as required by Fed. R. Civ. P. 12(b)(6) and 8(f), this Court understands TCI's Count I to allege that MCI's actions constituted "willful misconduct" and therefore violated the MCI Tariff, an alleged breach of contract. Count II similarly claims that the MCI Tariff allows liability for MCI's alleged "willful misconduct", which allegedly supports tort liability for intentional misrepresentation.

772 F. Supp. at 67. The Court went on to state that in reviewing and interpreting the MCI Tariff all the sections had to be considered, including the section on "willful misconduct."

> Certainly, *the tariff as a whole*, and not merely the rates contained therein, is paramount. Otherwise, many provisions of the MCI Tariff would be meaningless. *The entire MCI Tariff must be controlling, including the "willful misconduct clause . . . "* The MCI Tariff itself does not clearly preclude a contract or tort claim against MCI based on its alleged "willful misconduct." Recovery by TCI, therefore, is not precluded.

Finally, the Court stated "Analysis of the Communications Act of 1934 supports this conclusion."

The *TCI* decision, *supra*, thus recognizes that Rule B-4.02 of the MCI Tariff is a reaffirmation of the *Primrose* decision, *supra*, that for over a century, carriers have been prohibited from utilizing their respective tariffs to limit their liability for claims based on willful misconduct. The First Circuit in its opinion failed to even consider this issue and instead erroneously stated that Matrix did not

respond in its Reply Brief to the interpretation asserted by MCI in its brief. In fact, Matrix spent roughly 10% of its Reply Brief distinguishing the interpretation asserted by MCI.

Given the fact that the MCI Tariff clearly states that "MCI's liability for willful misconduct is not limited by [its] tariff" and *all* of the causes of actions asserted by Matrix against MCI involve willful misconduct by MCI, it is equally clear that *none* of the causes of action set forth in Matrix's First Amended Complaint are arbitrable. For this separate and distinct reason, Matrix, therefore, has an absolute right to proceed in Court under its First Amended Complaint and this Court thus should grant certiorari and reverse the First Circuit's opinion summarily.

D.

There is a conflict between the Ninth Circuit and First Circuit on whether one of the world's largest telecommunication carriers can utilize its tariff to deny parties their statutory rights and remedies under the Communications Act

MCI Tariff Arbitration Provision (B-7.13) violates (a) the Communication Act, (b) the MCI Tariff and (c) Matrix's entitlement to be awarded multiple damages and attorney's fees, as the Ninth Circuit has held in the analogous case of *Graham Oil v. ARCO, supra.* The First Circuit in its opinion rejected "Matrix's reliance on" the *ARCO* decision as "misplaced" and held that "[t]he applicable precedent in our circuit is instead that parties may contract to limit remedies in arbitration." *MCI v. Matrix,* 135 F.3d at 33 n.12.

What the opinion of the First Circuit ignores is that one of the principle purposes of the Communications Act is to keep communication carriers, such as MCI, from abusing their immense power in dealing with entities smaller and dependent on them. In fact, § 414 of the Communications Act explicitly preserves Matrix's right to proceed as it did under its First Amended Complaint by providing that "[n]othing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." (App. 141). Based on this reservation of rights under the Communications Act to proceed at "common law or by statute," Matrix filed its First Amended Complaint against MCI in five counts alleging in Count I – actual and multiple damages and attorneys' fees under Mass. Gen. Laws ch. 93A; in Count II – actual damages and attorneys fees under the Lanham Act; and in Counts III, IV, and V – actual and multiple damages for fraud and deceit.

In spite of the specific reservation of rights in § 414 of the Communications Act and the express congressional intent under the Communications Act that certain rights and remedies be accorded Matrix and others similarly situated, the MCI Tariff mandates that the JAMS arbitrator is precluded from granting the following forms of relief that Matrix is entitled to receive under the Communication Act, Mass. Gen. Laws ch. 93A, the Lanham Act and at common law:

I. Multiple Damages

The MCI Tariff Arbitration Provision (B-7.13) at B-7.13812 states that "the arbitrator" may not "award . . . treble damages or penalties." Such a declaration is contrary to the MCI Tariff which state that MCI's liability for "willful misconduct" is not limited. Rule B-4.02. Every Count in Matrix's First Amended Complaint alleged willful misconduct by MCI. This certainly overrides the preclusionary rules contained in the MCI Tariff Arbitration Provision (B-7.13). *MCI v. TCI Mail, supra.* If MCI has violated Mass. Gen. Laws Chapter 93A, as alleged in Matrix's Amended Complaint, then Matrix is entitled to an award of multiple damages. *Anthony's Pier Four, Inc. v. HBC Associates,* 411 Mass. 451, 583 N.E.2d 806 (Mass. 1991). Furthermore, the Court under the Lanham Act, 15 U.S.C. § 1117, may award additional damages up to three times the amount awarded for actual damages. *U-Haul International, Inc. v. Jartran, Inc.,* 601 F. Supp. 1140 (Ariz. 1984), *rev'd on other grounds,* 793 F.2d 1034 (1986).

II. Attorneys' Fees

The MCI Tariff Arbitration Provision (B-7.13) at B-7.13812 provides that "the arbitrator" may not "assess attorneys' fees." This is contrary to § 206 of the Communications Act, which ensures the right of a complainant, such as Matrix, to recover attorneys' fees from carriers such as MCI. The right of Matrix to receive attorneys' fees is further vouchsafed under Mass. Gen. Laws ch. 93A and the Lanham Act, 15 U.S.C. § 1117. *U-Haul v. Jartran, supra.*

III. Limitation Period

Section 415 of the Communications Act provides a two year statue of limitations for Matrix and other claimants to file suit against MCI to recover damages. Contrary to and in violation of § 415 of the Communications Act, Rule B-7.05 of the MCI Tariff imposes a limitation period of six months in which "to give MCI written notice of a dispute with respect to MCI's charges," otherwise the invoice by MCI "shall be deemed to be correct and binding on the customer." This provision of the MCI Tariff cannot override the Communications Act.

IV. Interlocutory Relief

The express language of the MCI Tariff Arbitration Provision (B-7.13) at B-7.13812 mandates that "the arbitrator may not award any interlocutory relief." This restriction is contrary to the statutory rights granted Matrix by the Lanham Act under which Matrix sued in Count II, which specifically empowers the district court to grant injunctions. 15 U.S.C. § 1116. *William R. Warner & Co. v. Eli Lilly & Co.*, 265 U.S. 526 (1924).

The Courts of the First Circuit and other circuits also have held that an injunction is an appropriate remedy under Mass. Gen. Laws ch. 93A. *Engine Specialties, Inc. v. Bombardier Ltd.*, 454 F.2d 527, 530-531 (1st Cir. 1972); *Tri-State Generation v. Shoshone River Power, Inc.*, 805 F.2d 351 (10th Cir. 1986), *appeal after remand*, 874 F.2d 1346 (10th Cir. 1989); *Roso-Lino Beverage Distributors, Inc. v. Coca-Cola Bottling Co.*, 749 F.2d 124 (2d Cir. 1984).

By entering into the October 1995 Agreement, Matrix did not abandon these statutory and common law rights. *ARCO* is squarely on point and these same issues were presented to the Ninth Circuit Court of Appeals. In that case, the Court struck down the arbitration clause in the agreement between ARCO and Graham Oil, because the arbitration clause deprived Graham Oil of its right to receive exemplary damages, the right to recover reasonable attorneys' fees and imposed a one year statute of limitations which were explicitly granted it by the Petroleum Management Practices Act ("PMPA"), 15 U.S.C. §§ 2801-2806. To this end the Court of Appeals in *ARCO* stated:

> Each of the three statutory rights is important to the effectuation of the PMPA's policies. The purpose of exemplary damages is to deter franchisors from engaging in improper terminations of franchise agreements. The purpose of attorney's fees is to deter franchisors from improperly contesting meritorious claims. Finally, the purpose of a one-year statute of limitations is to afford franchisees a reasonable period of time in which to seek relief for improper termination and other abuses by petroleum franchisors. In attempting to strip franchisees of these statutory rights and benefits by means of an arbitration clause included in the franchise agreement, ARCO violated the purpose as well as the specific terms of the PMPA.
>
> Because the arbitration clause employed by ARCO compels Graham Oil to surrender important statutorily-mandated rights afforded

> franchisees by the PMPA, we hold that the clause contravenes the Act.

Graham v. ARCO, 43 F.3d at 1248. (*emphasis added*).

. . . .

> Our decision to strike the entire clause rests in part upon the fact that the offensive provisions clearly represent an attempt by ARCO to achieve through arbitration what Congress has expressly forbidden. Congress enacted the PMPA precisely to prevent the type of agreement that ARCO included in the arbitration clause of its franchise contract. ARCO attempted to use an arbitration clause to achieve its unlawful ends. Such a blatant misuse of the arbitration procedure serves to taint the entire clause. As a leading treatise notes, severance is inappropriate when the entire clause represents an 'integrated scheme to contravene public policy' . . . For the above reasons, we conclude that the entire arbitration clause, and not merely the offensive provisions, must be stricken from the contract.

Id. at 1249.

In keeping with the decision of this Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985), the *ARCO* Court recognized the "fact that franchisees may agree to an arbitral forum for the resolution of statutory disputes in no way suggests that they may be forced by those with dominant economic power to surrender the statutorily-mandated rights and benefits the Congress intended them to possess." 43 F.3d at 1247. The Court in *ARCO* rationalized that "[i]f franchisees

could be compelled to surrender their statutorily-mandated protections as a condition of obtaining franchise agreements, then franchisors could use their superior bargaining power to deprive franchisees of the PMPA's protections" and as a result the rights and benefits afforded by Congress could be "nullified" by companies with superior bargaining power. *Id.*

MCI, like ARCO, is attempting to use the MCI Tariff to deny Matrix the rights granted it by Congress and by the MCI Tariff itself. MCI's attempt to compel arbitration and deny Matrix its substantive rights are ineffectual in barring the rights of Matrix to a trial by jury of its Chapter 93A and other claims, but it must further fail because any waiver of substantive rights such as claims at common law or under Chapter 93A must be clear and unmistakable which does not exist in this instance. *North American Consolidated, Inc. v. Kopka,* 644 F. Supp. 191 (D. Mass. 1986).

CONCLUSION

For all the foregoing reasons this Court should grant certiorari and reverse the First Circuit's opinion summarily.

Respectfully submitted,

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APPENDIX

MCI TELECOMMUNICATIONS CORPORATION, Plaintiff, Appellee,

v.

MATRIX COMMUNICATIONS CORPORATION, Defendant, Appellant.

Nos. 96-2246, 97-1570.

United States Court of Appeals,
First Circuit.

Heard Nov. 4, 1997.

Decided Jan. 27, 1998.

Richard W. Miller with whom Stephen R. Miller, Andrew C. Gately, Kansas City, MO, John D. Hanify, and Joseph A. Cortellini, Boston, MA, were on brief, for appellant.

Paul M. Smith with whom Ross B. Bricker, Terri L. Mascherin, Chicago, IL, Mark A. Berthiaume, Louis J. Scerra, Jr., Boston, MA, and David J. Brecher, New York City, were on brief, for appellee.

Before BOUDIN, Circuit Judge, COFFIN, Senior Circuit Judge, and DOWD,* Senior District Judge.

COFFIN, Senior Circuit Judge.

The parties in this case have been engaged in a heated battle over the proper setting for their underlying legal dispute. Appellee MCI Telecommunications Corp.

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* Of the Northern District of Ohio, sitting by designation.

insists that the conflict must be resolved through arbitration, while appellant Matrix Communications Corp. asserts that the arbitration clause in the parties' contract does not apply here, and that it is entitled to a judicial forum for its claims. The district court sided with MCI – thus ordering arbitration – and then rejected Matrix's motion under Fed.R.Civ.P. 60(b) to set aside that ruling based on newly discovered evidence. Matrix appeals both the judgment on the merits and the Rule 60(b) decision. After close review of the tangled procedural backdrop and the substantive issues, we affirm.

I. Factual and Procedural Background

Little needs to be said about the companies' underlying dispute, which arises from an October 1995 agreement (the "Agent Agreement") in which MCI gave Matrix limited agency to sell MCI services. The Agent Agreement provided for substantial commissions if Matrix generated a specified minimum amount of revenue for MCI. Matrix alleged, *inter alia*, that MCI improperly terminated the Agent Agreement eight months later, in June 1996, because Matrix was so successful in obtaining customers that MCI owed it more than one billion dollars in commissions that the corporation did not wish to pay. MCI countered that termination was proper because Matrix breached the terms of the Agent Agreement in various ways.

Following MCI's termination, Matrix filed suit in Massachusetts state court. MCI removed the action to federal court. It then moved to stay the litigation and compel arbitration, on the ground that the language of

the arbitration clause in the Agent Agreement unambiguously evidenced the parties' intent to arbitrate all disputes arising from that agreement. The provision, contained in paragraph 22 of the Agent Agreement, states:

> Any dispute relating to this Agreement shall be submitted for binding arbitration in accordance with the rules contained in MCI Tariff FCC No. 1 and judgement [sic] on any award entered therein may be entered in any court of competent jurisdiction.

Matrix opposed the motion to stay, arguing that, because MCI Tariff FCC No. 1 ("the Tariff") expressly limited arbitration to customer billing disputes of $10,000 or more, and Matrix neither was a customer nor had a billing dispute of any amount with MCI, the arbitration clause did not apply to its dispute.[1]

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[1] A tariff is a detailed compilation of charges, regulations and other relevant information about the provision of telecommunications services to the public that common carriers like MCI are required to file with the FCC. MCI Tariff FCC No. 1 is a voluminous document whose "Section B," labeled "Rules and Regulations," spans 34 pages and contains nineteen separate rules. Rule No. 7 is labeled "Payment Arrangements" and has twenty-one subsections. One of those subsections, B-7.13, is entitled "Arbitration of disputes," and states, in part:

> All disputes concerning or affecting payment of invoices issued after February 28, 1994 for charges totaling $10,000 and above may be resolved through binding arbitration.

Subsection B-7.13 is further divided into numerous parts that detail the procedures to be used in such arbitrations. Section .1327, for example, requires the Responding Party to file a written answer within 17 days after the arbitration commences; section .133 directs the case manager to hold an administrative conference within nine days of the arbitration's commencement;

Judge Harrington of the United States District Court for the District of Massachusetts held a hearing on MCI's motion to compel arbitration on September 27, 1996. Later that day, he signed an order granting the motion, concluding that the arbitration clause unambiguously reflected an intention by the parties to arbitrate all disputes relating to the Agreement. In his view, the Tariff was referenced not to define the scope of the agreement to arbitrate but to provide the procedural rules under which any arbitration would take place.

The same day, Matrix filed a notice of voluntary dismissal under Fed.R.Civ.P. 41(a)(1)(i).[2] In a letter to Judge Harrington, Matrix's counsel explained that the company had decided to ask the arbitrator to rule on whether Matrix could receive all the relief it sought through arbitration. If so, Matrix would consent to continue the arbitration; if not, Matrix would refile its action in federal court.

Judge Harrington dismissed the action. On September 30, the day both the order compelling arbitration and the grant of dismissal were entered on the docket, Matrix initiated the arbitration by filing a claim with J.A.M.S./

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under section .1341, the appointed arbitrator may be removed only for bias or "other good cause"; section .135 provides for an exchange of documents and other information within 23 days after the arbitration commences; and section .1391 provides for the privacy of all arbitration conferences and hearings.

[2] Although Judge Harrington may have ruled before Matrix filed for dismissal, it appears that Matrix did not learn of the ruling until later, and believed at the time it filed that the decision would not be made for several days.

Endispute ("JAMS"), the arbitration administrator designated by MCI in its Tariff. Matrix argued to the arbitrator, as it had to the court, that its claims were not arbitrable, and again relied on a reading of the arbitration clause that limited its scope to billing disputes exceeding $10,000.

MCI responded two days later, on October 2, by filing its own action in federal court seeking to compel arbitration of Matrix's claims. Although Matrix was at that point participating in arbitration, MCI was concerned that Matrix would not follow through if the arbitrator decided the threshold questions against Matrix's position. Because of his involvement in the earlier proceeding, Judge Harrington was assigned the MCI action. Without additional hearings or any responsive pleading from Matrix, he entered an order on October 10 compelling Matrix to arbitrate all of its claims and awarding MCI attorney's fees.

Meanwhile, the arbitration that Matrix had initiated went forward, and, on December 10, 1996, the arbitrator ruled that Matrix's claims were arbitrable but that certain types of relief sought by Matrix, including multiple damages and attorney's fees, were unavailable in the arbitration because the Tariff barred such remedies. In February 1997, Matrix filed a motion in district court under Fed.R.Civ.P. 60(b), seeking relief from the October 10 order. Matrix contended that MCI had fraudulently induced it to enter into the arbitration clause in the Agent Agreement by concealing an agreement between JAMS and MCI that provided for a close working relationship between the two companies and specified various payments and services to be given by MCI to JAMS. Matrix

argued that the MCI/JAMS Agreement constituted newly discovered evidence of bias on the part of JAMS in favor of MCI. MCI opposed the motion, filing affidavits and other materials in support of its position that the JAMS Agreement had not been concealed and did not evidence bias on the part either of JAMS, or, more importantly, the arbitrator.

Following a hearing, District Court Judge Saris denied the Rule 60(b) motion,[3] concluding that Matrix had failed to show the elements necessary for post-judgment relief, *see Hoult v. Hoult*, 57 F.3d 1, 5-6 (1st Cir.1995). *See infra* at 16.

Matrix appeals from the October 10, 1996 order compelling arbitration of its claims, and the March 27, 1997 denial of its rule 60(b) motion.

II. Discussion

Before discussing the district court's October 10 judgment and its subsequent rejection of Matrix's Rule 60(b) motion, we must address a threshold issue raised by MCI. It claims that, because Matrix voluntarily submitted the issue of arbitrability to the arbitrator, who then determined that Matrix's claims are arbitrable, Matrix cannot at this juncture challenge the arbitrator's authority to hear the case. This appeal, MCI contends, is moot.

We have little difficulty in concluding that the appeal should go forward. From the outset, Matrix explicitly

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[3] The case had been reassigned to Judge Saris subsequent to Judge Harrington's October 10, 1996 order.

advised the district court that it would return to the courtroom if the arbitrator ruled that Matrix could not obtain all the relief it sought in the arbitral forum. Although MCI cites language suggesting that Matrix later agreed to arbitrate its claims if the arbitrator ruled that they were arbitrable, we are persuaded that that language was unfairly drawn out of context and that Matrix's actual position has been consistently in opposition to resolving its claims through arbitration unless it were possible to obtain full relief. Indeed, we think it disingenuous, and bordering on effrontery, for MCI to suggest otherwise.

We now turn to the issues raised by Matrix on appeal.

A. The October 10 Ruling

At the outset of our analysis, it is worth recalling the context of the district court's decision on October 10 to compel arbitration. The motion on which the court ruled was filed by MCI on October 2. Only three working days earlier, on September 27, the court had held a hearing on arbitrability pursuant to *Matrix's* action, and had concluded that the Agent Agreement's arbitration clause embraced *all* disputes. That decision was not enforced then because, virtually contemporaneously, Matrix dismissed its suit. Seeking to resolve the arbitrability question, MCI jumped in with its own action, and the court responded on October 10 by compelling arbitration,

thereby effectively (though not technically) reinstating its earlier decision.[4]

If review of that decision posed only the question whether the court properly interpreted the Agent Agreement to compel arbitration of the parties' dispute, our task would be straightforward and relatively easy. But several factors affect our analysis, two of which complicate the inquiry. First, the court ruled before Matrix had answered MCI's complaint seeking to compel arbitration, and without a hearing, although Section 4 of the Federal Arbitration Act states that "[t]he court shall hear the parties" before ordering arbitration to proceed.[5] The second difficulty is that Matrix's appellate challenge to the arbitration clause includes arguments that the district court never considered, an omission that typically forecloses us from taking them into account. *See United States v. Bongiorno*, 106 F.3d 1027, 1034 (1st Cir.1997). The two

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[4] Matrix complains that the district court wrongly "based" its October 10 order on the September 27 order, which had become a "nullity" once Matrix dismissed its suit. Although Judge Harrington's October 10 order stated that it was "[i]n accordance with" the earlier decision, we take that as a shorthand reference to the content of that decision – which he chose not to repeat – rather than as a statement of precedent governing the October 10 ruling.

[5] The relevant portion of the statute states:

> The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. § 4.

problems obviously are intertwined; Matrix logically points out that it had no opportunity to make *any* arguments to the district court because, in its view, the court ruled prematurely.

The third factor, somewhat simplifying our task, is that Matrix asserts that it does not challenge any procedural flaws in the district court's ruling, specifically waiving its complaints about the speed of the court's judgment and its failure to hold a hearing. It maintains that we should resolve "the underlying issue of whether Matrix must arbitrate its claims against MCI since such a determination is largely a question of law in which no material facts are in dispute." Procedural errors alone, therefore, are waived as a basis for vacating the district court's judgment.[6]

We address first the straightforward issue: whether the arbitration clause in the Agent Agreement applies to the present conflict.[7] We think it does, finding unpersuasive Matrix's argument that the reference to the Tariff in that clause meant that the Agent Agreement limited arbitration only to customer billing disputes in excess of $10,000 – the types of claims specifically arbitrable under the Tariff. Like the district court, we think the only sensible reading is that the Tariff was incorporated to provide a set of procedural rules for arbitrations arising from the

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[6] In any event, as we discuss *infra* at 32-33, Matrix's failure to raise issues before the district court in a motion for reconsideration bars them on appeal.

[7] Our review on this question is *de novo*. *See Keystone Shipping Co. v. New England Power Co.*, 109 F.3d 46, 50 (1st Cir.1997).

Agent Agreement. Not only is the opening language of the arbitration clause in the Agent Agreement broad – "any" dispute relating to this agreement "shall" be submitted for arbitration – but the limited construction proposed by Matrix would have the absurd result of entirely negating the arbitration provision. Under Matrix's view, because the Agreement established an agency relationship between MCI and Matrix, and the Tariff provided for arbitration only of *customer* billing disputes, no issue arising between the two parties to the Agent Agreement could fall within the arbitration clause. Matrix explains this disjunction by arguing that the clause was inserted to specify the dispute resolution procedure for customers brought to MCI by Matrix. We find this argument to be implausible. Either the MCI Tariff would directly govern the customers' claims – making reference to the Tariff in the Agent Agreement unnecessary – or the customers themselves would have to agree to arbitration.

The Tariff language, moreover, reinforces our reading of the Agent Agreement's arbitration provision. In subsection 7.13, the portion titled "Arbitration of disputes," *see* note 1 *supra*, the Tariff states that arbitrations "shall be conducted under the arbitration rules and procedures set forth in Sections B-7.131 through B-7.139 (Rules)," which account for more than four pages of text. Thus, while all of Section B of the Tariff carries the heading "Rules and Regulations," this portion of Rule 7, which governs arbitration, makes another, limited use of the term "Rules" to denote the specific provisions relating to arbitration. It is much more reasonable to construe the use of the word "rules" in the Agent Agreement's arbitration clause to refer to the limited set of rules concerning arbitration

than to all nineteen rules contained in Section B of the Tariff on a broad range of subjects.

In addition, when viewed against the backdrop of the federal policy favoring arbitration, *see, e.g., Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 475-76, 109 S.Ct. 1248, 1253-54, 103 L.Ed.2d 488 (1989); *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 941-42, 74 L.Ed.2d 765 (1983),[8] and the generous reading given to broadly worded commercial arbitration agreements, *see, e.g., Raytheon Co. v. Automated Bus. Sys.*, 882 F.2d 6, 9-11 (1st Cir.1989), the provision here cannot bear the interpretation Matrix seeks to assign to it. We thus agree with the district court that the arbitration provision contained in paragraph 22 applies to any dispute relating to the Agent Agreement, and that the Tariff was incorporated by reference merely "to guide an arbitrator as to how he should conduct his hearing."

Having concluded that paragraph 22 requires arbitration between these parties, we must confront Matrix's assertion that it was duped into accepting the provision by representations from MCI officials that the clause applied only to billing disputes involving customers brought to MCI by Matrix. Fraud in inducing acceptance of the arbitration clause unquestionably would negate the contractual agreement on that issue. *See generally Prima*

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[8] The Supreme Court in *Moses H. Cone Memorial Hosp.* stated that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." 460 U.S. at 24-25, 103 S.Ct. at 941.

Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 & n. 12, 87 S.Ct. 1801, 1805-06 & n. 12, 18 L.Ed.2d 1270 (1967); *see also Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1139-40 (9th Cir.1991); *Wick v. Atlantic Marine, Inc.*, 605 F.2d 166, 168 (5th Cir.1979) ("[i]f . . . the arbitration clause was induced by fraud, there can be no arbitration").

As noted above, however, Matrix never raised this issue of fraud before the district court,[9] a default that implicates our bedrock principle that new arguments may not be made on appeal.[10] *See Bongiorno*, 106 F.3d at 1034; *Lawton v. State Mut. Life Assurance Co. of Am.*, 101 F.3d 218, 222 (1st Cir.1996). But applying this rule to these circumstances presents something of a puzzle. Matrix maintains that it cannot be penalized for failing to assert *all* theories because the district court gave it no opportunity to offer any, having ruled without a hearing and before Matrix answered MCI's complaint. Seeking to avoid a remand, Matrix waives any claim that the court's procedure was improper and contends that the questions

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[9] In fact, in its Memorandum in Opposition to Defendants' Motion to Stay Action and Compel Arbitration (in the first, Matrix-filed lawsuit), Matrix stated: "Matrix does not contend that the parties have not agreed to arbitrate pursuant to the Tariff Rules, and therefore raises no questions about the existence or validity of the arbitration agreement generally."

[10] In reviewing the district court's substantive ruling, we may not consider materials added to the record in connection with the Rule 60(b) motion. *See J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1250 (1st Cir.1996).

we face are legal in nature and thus suitable for resolution by the appellate court.

Although we do not wish to condone precipitous action by the district court (and the procedural irregularities), we have some difficulty with Matrix's position. First, while interpretation of the arbitration provision presents a legal question that is as suitable for our review as for the trial court's, the issue of fraud is decidedly fact-based and thus inappropriately brought to us first. We may not assume the trial court's role of factfinder. In addition, Matrix's assertion that it had no opportunity to raise the issue of fraud before the district court is at least somewhat disingenuous. Only days before MCI filed its action, the district court had held a hearing on the enforceability of the Agent Agreement's arbitration provision – with no suggestion of fraudulent inducement. Putting to one side the technical errors, which Matrix waives, the court reasonably could assume that Matrix's position with respect to the arbitration clause would be the same a week later.

It is theoretically possible, of course, for Matrix to have changed its strategy during that interim, and for the district court's quick action thus to have deprived Matrix of its most direct opportunity to air the claim of fraud. If that were the case, however, we would expect Matrix to have alerted the court to its new position through a motion for reconsideration. Particularly when a new theory turns on questions of fact, we are disinclined to stray from our longstanding raise-or-waive rule. If Matrix did not have the information within the post-trial motion period, its only recourse was through its 60(b) motion.

In short, neglecting to seek reconsideration meant omission before the trial court of the fraud theory upon which Matrix now wishes to rely. Although the circumstances here are peculiar, we conclude that Matrix's "failure to move for reconsideration of the district court order should not be excused," *VanHaaren v. State Farm Mut. Auto. Ins. Co.*, 989 F.2d 1, 5 (1st Cir.1993). *Cf. Berkovitz v. Home Box Office, Inc.*, 89 F.3d 24, 31 (1st Cir.1996) ("[T]his court from time to time has refused to permit appellants to take advantage of supposed oversights that had not been called to the district court's attention by way of a timeous motion to reconsider."); *United States v. Schaefer*, 87 F.3d 562, 570 n. 9 (1st Cir.1996) (failure to move to reopen the proceedings or for reconsideration undercuts claim of surprise about use of police report in suppression hearing); *Beaulieu v. IRS*, 865 F.2d 1351, 1352 (1st Cir.1989) ("[I]t is a party's first obligation to seek any relief that might fairly have been thought available in the district court before seeking it on appeal."). We therefore conclude that Matrix has forfeited its claim that the arbitration clause should be invalidated on the basis of MCI's alleged statements that the arbitration clause did not apply to the Agent Agreement.[11] Consequently, we affirm the district court's October 10 judgment compelling arbitration.[12]

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[11] We recognize that Matrix's waiver of procedural errors was motivated by a desire to have its claims heard promptly, in this court. Omission of the hearing required by Section 4 of the Arbitration Act also could have been addressed by the district court if brought to its attention on a motion for reconsideration, and, even if the issue were not waived, we would be inclined to view it as defaulted.

[12] Equally unavailing is Matrix's new contention that the Agent Agreement's arbitration clause is invalid because the Tariff arbitration rules foreclose remedies, such as multiple

B. The Rule 60(b) Motion

Matrix's effort to undo the October 10 decision via Rule 60(b) rests on the agreement establishing JAMS as the administrator of MCI's arbitration program. Under Rule 60(b)(2), the district court has discretion to vacate a judgment based upon "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." *See Hoult*, 57

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damages, to which it is entitled. Putting aside the question of waiver, this argument must be brought to the arbitrator because it does not go to the arbitrability of the claims but only to the nature of available relief. *See Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 230-31 (3d Cir.1997) ("Any argument that the provisions of the Arbitration Agreement involve a waiver of substantive rights afforded by the state statute may be presented in the arbitral forum. It would be anomalous for a court to decide that a claim should be referred to an arbitrator rather than a court, and then, by deciding issues unrelated to the question of forum, foreclose the arbitrator from deciding them."); *PaineWebber Inc. v. Elahi*, 87 F.3d 589, 599 (1st Cir.1996) ("[T]he signing of a valid agreement to arbitrate the merits of the subject matter in dispute presumptively pushes the parties across the 'arbitrability' threshold; we will then presume that other issues relating to the substance of the dispute or the procedures of arbitration are for the arbitrator.")

Matrix's reliance on *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir.1994), is misplaced because, unlike the plaintiffs there, Matrix's claims are not brought under a statute specifically designed to protect bargaining rights. The applicable precedent in our circuit is instead that parties may contract to limit remedies in arbitration. *See Raytheon Co. v. Automated Bus. Sys.*, 882 F.2d 6, 12 (1st Cir.1989); *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60-62, 115 S.Ct. 1212, 1217-19, 131 L.Ed.2d 76 (1995) (finding that arbitration agreement did not include "an unequivocal exclusion of punitive damages claims").

F.3d at 5-6.[13] To prevail, a moving party must demonstrate that "the missing evidence was 'of such a material and controlling nature as [would] probably [have] change[d] the outcome.' " *Id.* at 6 (citations omitted).

Matrix argues that the MCI/JAMS Agreement easily satisfies both the "newly discovered" and "material and controlling" impact prongs of this standard. First, it asserts that it had no ability to discover the concealed

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[13] Although Matrix relied on both subsections (2) and (3) of Rule 60(b) in the district court, its briefs on appeal do not refer to subsection (3), which provides for relief from judgment based upon fraud, misrepresentation, or other misconduct. *See Anderson v. Cryovac, Inc.*, 862 F.2d 910, 924 (1st Cir.1988) (setting forth the standard applicable to 60(b)(3) claims: retrial mandated only when the challenged misconduct has "substantially" interfered with aggrieved party's ability to fully and fairly prepare for and proceed at trial). Matrix's reply brief contained no such argument even in the face of MCI's assertion in its brief that the 60(b)(3) claim was waived. Matrix does argue generally, however, that the district court orders should be vacated because of fraudulent conduct and misrepresentations by MCI. To the extent that Matrix has not waived a 60(b)(3) claim by failing to brief it fully, we find no abuse of discretion in the district court's rejection of that claim, as we agree with its conclusion that lack of access to the MCI/JAMS Agreement was inconsequential in the proceeding before Judge Harrington. As Matrix posits, if the MCI/JAMS Agreement had been brought to Judge Harrington's attention, he would have had to consider, in addition to the contractual language, "whether a reasonable person would have agreed to an arbitration provision that called for JAMS to handle the arbitration of certain disputes, in view of the MCI/JAMS Agreement." As our discussion of Matrix's 60(b)(2) claim demonstrates, *see infra*, access to the MCI/JAMS Agreement would not have added measurably to Matrix's effort to invalidate the Agent Agreement's arbitration provision.

agreement, which it contends even JAMS' general counsel was unaware of until this litigation commenced.[14] Second, Matrix emphasizes that the MCI/JAMS Agreement reveals an improper relationship involving "substantial financial and reporting ties" between MCI and JAMS, and it argues that the Agreement's terms are so obviously suggestive of bias in favor of MCI that its mere existence is enough to invalidate the contested arbitration provision.

The district court, after a hearing, found Matrix's argument lacking in several respects. We may reject its judgment only upon finding an abuse of discretion, *see Ahmed v. Rosenblatt*, 118 F.3d 886, 891 (1st Cir.1997); *Hoult*, 57 F.3d at 3. We are unable to do so.

Judge Saris initially concluded that Matrix had failed to show that, with due diligence, it could not have discovered the evidence earlier. She pointed out that Matrix conceded at oral argument that corporate sponsored arbitration programs are commonplace, and that the MCI Tariff named JAMS as the company's arbitration administrator. Had Matrix been concerned about the details of the arrangement, she observed, it could have sought to discover them.

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[14] Although Matrix asserts that JAMS' general counsel "professes he was unaware of the MCI/JAMS Agreement until this litigation commenced," the attorney, Michael Young, actually stated that he was unfamiliar with the *terms* of the agreement, not that he was unaware of any contractual relationship.

Matrix's attorney states that he discovered the agreement in November 1996 as a result of an offhand remark by an attorney in an unrelated case.

Matrix argues on appeal, however, that it was essentially foreclosed from conducting discovery by the sequence of proceedings in the district court. In the original Matrix lawsuit, MCI secured an extension of time to comply with its obligation to make the voluntary disclosures required under Fed.R.Civ.P. 26, which had the effect of holding off other discovery. The court then granted the motion to compel arbitration before the extended time period had expired. Matrix argues that MCI therefore managed to avoid producing any documents, including the undisclosed MCI/JAMS Agreement. In the subsequent MCI lawsuit, no opportunity for discovery was presented because the court's ruling preceded *any* action by Matrix.

We need not resolve whether the district court erred in finding that Matrix did not exercise due diligence with respect to the MCI/JAMS relationship because we conclude, *infra*, that the Agreement between them was not likely to have had an effect on Judge Harrington's decision. Before moving on to the materiality discussion, however, we wish to note that MCI's failure to make the Agreement available when it first was requested from JAMS in November 1996 is incomprehensible to us.[15] Its

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[15] Matrix on November 8 requested that a copy of the Agreement be provided before a meeting scheduled with the arbitrator for November 15. In a reply sent on November 15, the JAMS case manager directed Matrix to request the document via subpoena as provided in the Tariff Arbitration Rules. A conference was held on November 22 with counsel for both parties and the arbitrator. Matrix again requested a copy of the Agreement, but MCI refused to turn it over unless Matrix signed a strict confidentiality agreement. Matrix would not sign

refusal to do so undoubtedly fueled the already bitter nature of this litigation, and intensified the wrangling over the Agreement's contents. Moreover, while the provisions of the MCI/JAMS agreement are not sufficiently troublesome to warrant the extraordinary relief for which Rule 60(b)(2) is reserved, they do include matters unquestionably of interest and concern to parties contracting to arbitrate with MCI. Our judgment should not be taken to condone MCI's nondisclosure.

Even if we were to conclude that the district judge erred in finding a lack of diligence, her judgment that "Matrix's motion flunks the materiality test" would stand as a separate barrier to relief. After noting that the burden is on the party presenting the new evidence to demonstrate that it would probably have changed the outcome, and that Matrix was not challenging the impartiality of the arbitrator selected by JAMS, Judge Saris considered the provisions of the MCI/JAMS Agreement that Matrix claimed were pivotal. She found only one that caused her to hesitate in finding that the Agreement was entirely immaterial. That provision precluded the arbitrator from making findings of fact and conclusions of law. *See* App. at 1190 (MCI/JAMS Agreement at Section XIIE). Judge Saris ultimately concluded that the provision had no significant effect, and we agree.

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such an agreement. On December 10, the arbitrator entered an order that all documents exchanged in the arbitration would be confidential, but Matrix did not receive notice of the order until the next conference with the arbitrator, on January 8, 1997. The MCI/JAMS Agreement was given to Matrix at that conference.

MCI is an institutional litigant and probably has no interest in having an arbitrator spell out findings and legal rulings that might be used against it in future cases with its customers. But there is no reason whatever to think that Matrix would have regarded such a position as material. Its contract does not involve ordinary customer disputes, and Matrix is fully capable of litigating the matters afresh whether before an arbitrator or in court.

Indeed, Matrix' only explanation as to why it might have cared about the provision involves a terse suggestion that arbitrator findings and conclusions might help Matrix establish willfulness, a requirement that Matrix says is necessary to avoid a limitation on liability otherwise imposed by the Tariff. That limitation provision is not part of the Tariff arbitration rules, however, and is therefore inapplicable.[16] MCI argued that the liability limitation is clearly directed under the Tariff to delays and installation and like matters involving MCI's relations with its customers and has nothing to do with this case, and Matrix is visibly silent on this issue in its reply brief. And, as it happens, the arbitrator in this case does propose to make findings and conclusions.

An additional factor reinforces the conclusion that the provision was immaterial. "It has long been settled that arbitrators are not required to make formal 'findings

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[16] We note that, like the arbitration rules in the MCI Tariff, the MCI/JAMS Agreement explicitly states that it covers the arbitration of *customer payment disputes over $10,000.* The parties seem to assume that the Agreement also applies to other arbitrations administered by JAMS for MCI, and we likewise are presuming its relevance here.

of fact' to accompany the awards they issue. Indeed, '[a]rbitrators have no obligation . . . to give their reasons for an award at all.' " *Raytheon Co.*, 882 F.2d at 8 (citation omitted). *See also Prudential-Bache Sec., Inc. v. Tanner*, 72 F.3d 234, 240 n. 9 (1st Cir.1995) ("It is well established that arbitrators are not required to either make formal findings of fact or state reasons for the awards they issue.") Moreover, errors in an arbitrator's legal rulings or factual findings do not provide a basis for reversal. *See, e.g., Prudential-Bache*, 72 F.3d at 239 & n. 6; *Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1253-54 (7th Cir.1994); *Advest, Inc. v. McCarthy*, 914 F.2d 6, 8 (1st Cir.1990). We cannot see how prohibiting a feature of arbitration that was not guaranteed to begin with could be deemed sufficiently material to have negated a party's willingness to arbitrate.

Matrix also highlights various payments and "perks" that the MCI/JAMS Agreement requires to be furnished by MCI to JAMS, including provision of "[f]ree MCI 800 numbers," a "free MCI Mail Account," and "[t]wo free dedicated phone lines." These services, however, are for use in connection with the tasks JAMS is required to provide under the contract (such as 24-hour electronic docketing and toll-free response to inquiries from MCI customers about arbitration), and we see nothing sinister in the communications company contracting to provide the "tools" for the work it seeks to obtain from its contractor, particularly when those tools are its stock-in-trade. Likewise, the payments specified in the MCI/JAMS Agreement are for services to be provided, plus a $40,000 start-up fee "to cover administration design, computer services and technical support". *See* App. at 1192-95.

Matrix knew from the outset, or should have known, that JAMS had a substantial relationship with MCI simply by virtue of its role as administrator of MCI's arbitration program. Matrix should have known as well that the two parties must have spelled out their working relationship in some form; we think it virtually inconceivable that there would be no written contract between them. Moreover, many of the terms that Matrix claims to find shocking in the MCI/JAMS Agreement were included in MCI's public request for bids for a contract to administer its arbitration program, meaning that those aspects of MCI's relationship with its arbitration administrator effectively were public knowledge when Matrix entered the Agent Agreement.[17]

With this much reasonably presumed to be already on the table, we are unpersuaded that the district court would have deemed the additional information contained in the MCI/JAMS Agreement material to Matrix's decision to participate in the arbitration. None of the contacts between MCI and JAMS specified in the Agreement involve the arbitrators who are deciding cases,[18] and

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[17] For example, the MCI/JAMS Agreement requires JAMS to provide weekly reports on the status of current arbitrations, 24-hour electronic docketing containing any change in the status of cases, deadlines the parties must meet and any decisions that affect what the parties must do, a centralized case scheduling system, and an 800 number to handle inquiries about arbitration from MCI customers. All of these services were contained in the bid request. *See* App. at 1828-1830.

[18] In fact, the MCI/JAMS Agreement states that arbitrators will be selected based on, among other factors, "absence of conflicts of interest with MCI," and "demonstrated neutrality and impartiality in professional practice". *See* Section XII(A).

Matrix's suggestion that any arbitrator working for JAMS would have an inherent bias toward MCI, as JAMS' customer, is contradicted by Matrix's explicit assurance that it did not doubt the impartiality of the arbitrator assigned to its case.[19] We consequently hold that the district court did not abuse its discretion in denying Matrix's Rule 60(b) motion.

In sum, Judge Harrington, as the appeal is presented to us, committed no reversible error in issuing the October 10 order granting MCI's motion to compel arbitration, and Judge Saris did not abuse her discretion in rejecting a new trial under Fed.R.Civ.P. 60(b).

Their judgments accordingly are affirmed. Each party to bear its own costs.

The Agreement also provides:

ENDISPUTE will ensure that arbitrators serving on the MCI panel have been screened for potential conflicts of interest with MCI prior to inclusion on the panel. When appointed to a particular proceeding, arbitrators will be required to disclose any conflicts of interest with MCI which may have developed during the interim since the arbitrator's inclusion on the panel. In addition, arbitrators will be screened prior to appointment to a particular arbitration for potential conflicts with the MCI customer who is a party to the case. *Id.* at (C).

[19] The arbitrator is the Honorable Robert L. Steadman, former chief justice of the Massachusetts Superior Court.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MCI TELECOMMUNICATIONS CORPORATION, Plaintiff v. MATRIX COMMUNICATIONS CORPORATION, Defendant.	CIVIL ACTION NO.: 96-11975-EFH

ORDER TO COMPEL ARBITRATION

October 10, 1996

HARRINGTON, D.J.

By this action, the Plaintiff MCI Telecommunications Corporation ("MCI") seeks to require that the Defendant Matrix Communications Corporation ("Matrix") arbitrate any claims it may have against MCI relating to a certain Authorized Sales Agent Agreement (the "Agreement") entered into between MCI and Matrix pursuant to a mandatory arbitration clause contained in the Agreement. This Court issued an Order dated September 27, 1996 in the case entitled *Matrix Communications Corporation v. MCI Telecommunications Corporation*, Civil Action No. 96-11285-EFH, staying the proceedings in said case and referring the action to arbitration.

Matrix has demonstrated its refusal to proceed to arbitration by:

(1) commenting an action in this Court, *Matrix Communications Corporation v. MCI Telecommunications Corporation*, Civil Action No. 96-11285-EFH (the "Matrix Action"), for the purpose of asserting claims against MCI relating to the Agreement; (2) filing a notice dismissing the Matrix Action immediately after this Court entered an Order staying the Matrix Action and referring the case to arbitration; (3) notwithstanding the Court's Order, forwarding a letter to this Court together with its notice of dismissal confirming that it had no intention of submitting its claims to arbitration, except on its own terms; and (4) filing a so-called "Notice of Claim" with the arbitrator for the sole and limited purpose of obtaining assurances that the arbitrator has the ability to award punitive damages which Matrix is seeking, but refusing to submit its underlying claims to arbitration.

MCI has instituted the present action, pursuant to 28 U.S.C. § 2201 and 9 U.S.C. § 4, for the purpose of ensuring that Matrix be required to arbitrate any claims it may have relating to the Agreement.

In accordance with the Court's Order in the case entitled *Matrix Communications Corporation v. MCI Telecommunications Corporation*, Civil Action No. 96-11285-EFH, dated September 27, 1996, the Court issues the following Order against Matrix Communications Corporation:

1. With respect to Count I, the Court: (a) declares the arbitration provision contained in the Agreement valid and binding; (b) declares that all disputes relating to the Agreement, including, without limitation, the claims asserted in the First Amended Complaint in the

case entitled *Matrix Communications Corporation v. MCI Telecommunications Corporation*, Civil Action No. 96-11285-EFH, must be arbitrated pursuant to the arbitration provision in the Agreement; and (c) awards MCI the costs of this action, including reasonable attorneys' fees.

2. With respect to Count II, the Court: (a) declares the arbitration provision contained in the Agreement valid and binding; (b) directs Matrix to participate in arbitration of any claims it has relating to the Agreement including, without limitation, the claims asserted in the First Amended Complaint in the case entitled *Matrix Communications Corporation v. MCI Telecommunications Corporation*, Civil Action No. 96-11285-EFH; and (c) awards MCI the costs of this action, including reasonable attorneys' fees.

This Order to Compel Arbitration is issued forthwith as defendant has attempted to frustrate the prior Order of this Court, dated September 27, 1996, by dismissing the action in *Matrix Communications Corporation v. MCI Telecommunications Corporation*, Civil Action No. 96-11285-EFH, immediately after the Court issued said Order referring the action to arbitration.

SO ORDERED.

/s/ Edward F. Harrington
EDWARD F. HARRINGTON
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MCI TELECOMMUNICATIONS CORPORATION, Plaintiff v. MATRIX COMMUNICATIONS CORPORATION, Defendant.	CIVIL ACTION NO.: 96-11975-PBS

MEMORANDUM AND ORDER

March 27, 1997

Saris, U.S.D.J.

Matrix Communication Corporation ("Matrix") has filed a motion under Fed. R. Civ. P. 60(b) to relieve it from the final judgment that was entered by this court (Harrington, D.J.) on October 10, 1996, compelling arbitration of the dispute between the parties. (*See* Docket 6). After hearing, the motion is ***DENIED***.

Matrix premises its Rule 60(b)(2) motion on "newly discovered evidence" in the form of a "concealed side agreement" between plaintiff MCI Telecommunications Corporation ("MCI") and the appointed arbitration service, J.A.M.S./Endispute ("JAMS"). To prevail, it must demonstrate that it could not have discovered this agreement with due diligence exercised in time to move for a new trial or judgment under Rule 59(b). *See Hoult v.*

Hoult, 57 F.3d 1, 5-6 (1st Cir. 1995) (holding that Rule 60(b)(2) was aimed at correcting erroneous judgments based on unobtainability of evidence). MCI argues that Matrix had the opportunity to conduct discovery into the relationship between MCI and JAMS, but failed to do so. At oral argument, Matrix agreed that it is commonplace to have corporate sponsored arbitration, and that the Tariff named JAMS as the administrator of the MCI arbitrations. If it were concerned about the details of the administration of the MCI-JAMS contract, it had the opportunity to conduct discovery. Accordingly, Matrix fails the due diligence test.

Moreover, Matrix's motion flunks the materiality test. The burden is on the party presenting the new evidence to demonstrate that the missing evidence was of such a material and controlling nature that it would probably have changed the outcome. *Kettenbach v. Demoulas*, 901 F. Supp. 486, 497 (D. Mass. 1995). As it concedes, Matrix has no evidence which would cast doubt on the impartiality of the arbitrator selected by JAMS – an experienced, retired judge on the Superior Court. 9 U.S.C. § 10(2). *See Hunt v. Mobil Oil Corp.*, 654 F. Supp. 1487, 1498-1499 (S.D.N.Y. 1987) (requiring a showing of "evident partiality" to vacate arbitrator's award).

Rather Matrix's primary argument is that it would not have consented to arbitration if it had known that the JAMS-MCI agreement expressly precluded the arbitrator from making findings of fact and conclusions of law. (*See* Section XII-E). While that prohibition does not appear in MCI Tariff FCC No. 1, which is silent on the point, the MCI-JAMS Agreement expressly provides that to the

extent there is a difference the Tariff trumps the Agreement. (JAMS Agreement at 2, § 10A). Matrix also argues that the Agreement authorizes ex parte communications between MCI and JAMS and "perks" that would undermine the partiality of JAMS. However, those communications are between the contract administrator and MCI, not the arbitrator. Accordingly, Matrix has not disclosed anything in the MCI-JAMS Agreement which would have been material to the decision to enter into an arbitration agreement.[1]

Finally, in order to prevail under Fed. R. Civ. P. 60(b)(3), Matrix must demonstrate "misconduct – like fraud or misrepresentation – by clear and convincing evidence, and must then show that the misconduct foreclosed full and fair preparation or presentation of its case." *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 923 (1st Cir. 1988), *cert. denied*, 498 U.S. 891 (1990). The mere fact that MCI failed to disclose the Agreement is not clear and convincing evidence of fraudulent or nefarious intent. Even if MCI should have produced the agreement as part of its automatic disclosure or discovery obligations under Fed. R. Civ. P. 26, in the absence of evidence of malicious or improper intent, Matrix must demonstrate that the non-disclosure substantially interfered with the ability to present its case to Judge Harrington. This Court concludes, based on the current record, that at best, the agreement is of "marginal relevance" to the primary issue before Judge Harrington – the application of the arbitration clause in paragraph 22 to this dispute. *Anderson*, 862

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[1] In any event, the arbitrator has agreed to make findings of fact and conclusions of law.

F.2d at 924; *See* Orders dated September 27, 1996 and October 10, 1996. Thus, even if the nondisclosure amounted to accidental "misconduct" or nonfeasance, Matrix has not shown substantial interference to justify allowing a motion pursuant to Rule 60(b)(3).

/s/ Patti B. Saris
PATTI B. SARIS
United States District Judge

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BY HAND

September 27, 1996

The Honorable Edward F. Harrington
United States District Court for
District of Massachusetts
US Post Office & Court House
Boston, MA 02109

Re: Matrix Communications Corporation v.
MCI Telecommunications Corporation
Civil Action No. 96-CV-11285-EFH

Dear Judge Harrington:

As you know, it is our position that the issues set forth in our First Amended Complaint do not arise out of the agreement between the parties, even if they did, the arbitration agreement between the parties, paragraphs 22, is limited in scope and does not apply to the claims set forth in our Amended Complaint. MCI has argued that these issues are subject to arbitration.

Our concern is that if you order arbitration and stay the action pending arbitration, then MCI will argue before the arbitrator that the arbitrator does not have jurisdiction to grant us the relief we seek. We thus will find ourselves whipsawed with a denial of our substantive rights.

In order to resolve this, we have filled [sic] a Notice of Dismissal without prejudice, thus clearing this matter from your docket. We simultaneously have submitted to MCI the attached Stipulation whereby Matrix agrees to arbitration if MCI will likewise agree, as suggested by MCI in open court, that all issues in our Amended Complaint are subject to arbitration, and that the arbitrator, has the right, power and jurisdiction to render the relief we seek.

If MCI refuses to sign this Stipulation today, then we are going to submit to J•A•M•S/Endispute for determination as to whether all of our issues can be arbitrated and whether the arbitrator will find that the arbitrator has the right, power and jurisdiction to award Matrix all the relief that it seeks in the Amended Complaint.

If the arbitrator determines that he has the right, power and jurisdiction to award Matrix all the relief it seeks, then we obviously will arbitrate. In the event MCI contests the authority to the arbitrator to award all the relief we seek, and if J•A•M•S•/Endispute determines that the arbitrator is without jurisdiction or does not have the authority to grant all the relief requested, then Matrix will refile its action in federal court.

We appreciate the time the Court has taken to consider this matter and we believe that the procedures we

are using will establish with certainty how the case will proceed from this date forward.

Respectfully yours,

/s/ William A. Zucker
William A. Zucker

WAZ/jrg

cc: Gary R. Greenberg, Esq.
Richard Miller, Esq.

ARBITRATION STIPULATION BETWEEN MATRIX COMMUNICATIONS CORPORATION AND MCI TELECOMMUNICATIONS CORPORATION

The parties hereto hereby stipulate and agree that:

1. All of the issues set forth in the First Amended Complaint, filed in the proceeding styled *Matrix Communications Corporation vs. MCI Telecommunications Corporation*, Civil Action No. 96-11285-EFH will be submitted to Jams/Endispute for arbitration together with any counterclaims relating thereto;

2. The arbitration will be held as provided in the procedural rules set forth in the Tariff. None of the substantive limitations in the Tariff will apply including any limitations on the notice of claim, the type of hearing, the law to be applied or the nature of the remedy or relief that the arbitrator is empowered to grant; and

3. The arbitrator shall have full power, authority and jurisdiction under applicable law to grant all the relief requested in the First Amended Complaint.

MATRIX COMMUNICATIONS CORPORATION,

By:/s/ James Miller
James Miller,
its President
Dated: September 27, 1996

MCI TELECOMMUNICATIONS CORPORATION,

By: _____

Dated:

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

MATRIX COMMUNICATIONS CORPORATION, Plaintiff, v. MCI TELECOMMUNICATIONS CORPORATION, Defendant.	CIVIL ACTION NO. 96-11285-EFH

MATRIX COMMUNICATIONS CORPORATION'S NOTICE OF DISMISSAL PURSUANT TO RULE 41(a)(1)(i)

(Filed Sep. 27, 1996)

Pursuant to Fed. Rules of Civil Procedure 41(a)(1)(i), the plaintiff Matrix Communications Corporation hereby dismisses as a matter of right the above-entitled action against the defendant MCI Telecommunications Corporation without prejudice before the filing of an answer or a motion for summary judgment by the defendant.

MATRIX COMMUNICATIONS CORPORATION,

By its attorneys,

/s/ William A. Zucker
William A. Zucker, B.B.O. No. 541240
GADSBY & HANNAH LLP
125 Summer Street
Boston, MA 02110
(617) 345-7000

[9-30-96
Notice of Dismissal
is allowed.
/s/ Edward F. Harrington, D.J.]

September 27, 1996

MILLER LAW FIRM

A PROFESSIONAL CORPORATION

4310 MADISON AVENUE

KANSAS CITY, MISSOURI 64111

TELEFAX (816) 561-6361

(816) 531-0755

Richard W. Miller

September 30, 1996

ATTENTION: Mr. Dariush Etemad-Moghadam

Administrator
J.A.M.S./Endispute
700 11th Street, N.W.
Suite 450
Washington, D.C. 20001

RE: Notice of Claim:
Matrix Communications Corp. v.
MCI Communications Corp.

Dear Mr. Etemad-Moghadam:

The undersigned represents Matrix Communications Corporation ("Matrix"). The following constitutes a Notice of Claim for arbitration under Rule 9: Section 7.1325 of MCI Tariff F.C.C. No. 1 Section B – Rules and Regulations Payment Arrangements ("Tariff Rules"), as defined and explained below.

Attached as Exhibit A is the First Amended Complaint ("Amended Complaint") filed by Matrix against MCI Telecommunications Corporation ("MCI") in the United States District Court For The District of Massachusetts. It is the position of Matrix that the claims and

causes of action set forth in the Amended Complaint do not arise out of the Agreement between Matrix and MCI dated October 1, 1995, ("Agreement") and, even if they did, it is the further position of Matrix that the arbitration provision set out in paragraph 22 of the Agreement is limited in scope and does not apply to or cover the claims set out in the Amended Complaint. Paragraph 22 of the Agreement is attached hereto as Exhibit B.

MCI has contended that the claims raised in the Amended Complaint are subject to arbitration. Following the commencement of the action, MCI moved to stay the action and compel arbitration of the disputes raised by Matrix in the Amended Complaint.

It is, and has been, the position of Matrix that the arbitration clause does not cover, and was never intended to cover, disputes of this nature. Because MCI has raised this issue, Matrix has elected to dismiss without prejudice its Amended Complaint and seek a determination from the arbitrator as to: (a) whether all issues, claims and causes of action set forth in the Amended Complaint can properly be submitted to and heard by J.A.M.S. Endispute for arbitration under Rule 7.1393; and (b) whether J.A.M.S. Endispute, under Rule 7.1393, has the right, power and jurisdiction to hear, resolve and award Matrix all the relief against MCI that Matrix seeks in the Amended Complaint (The "Submitted Issues").

The Amended Complaint asserts claims for relief in the following five Counts:

a) Count I is for actual and punitive damages, including attorneys fees, as a result of unfair and deceptive acts and practices of MCI under Massachusetts General Law Ch. 93A;

b) Count II is for damages sustained by Matrix due to false and misleading representations by MCI under Section 43(a) of the Lanham Act, 15 U.S.C.A. §1125(a);

c) Count III is for actual and punitive damages, as a result of the tortious interference by MCI with contracts that Matrix has with agents, subagents and customers;

d) Count IV is for actual and punitive damages, as a result of fraudulent and other wrongful acts by MCI in tortiously interfering with advantageous business relationships that Matrix had with agents, subagents and customers; and

e) Count V is for actual and punitive damages as a result of fraudulent acts and fraudulent conduct perpetrated by MCI on and against Matrix.

The Amended Complaint sets forth no claim by Matrix for breach of the Agreement and none of these five Counts is under the Agreement.

The Agreement contains an arbitration clause which provides that "[a]ny dispute relating to this Agreement shall be submitted for binding arbitration in accordance with the rules contained in MCI Tariff F.C.C. No. 1 and judgment on any award entered therein may be entered in any court of competent jurisdiction." A copy of the Tariff Rules referenced in the arbitration clause, and MCI's "Guide" to the Tariff Rules are annexed hereto as Exhibit C. The Rules identify J.A.M.S./Endispute as the

Administrator, and prescribe limitations on the subject matter of the arbitration, the law that can be applied, and the remedies and relief that can be granted by the arbitrator. A summary of such limitations is set forth in Exhibit D, attached and incorporated herein.

It is Matrix's position that in view of the limitations set forth in these Rules that these Rules have no applicability to its dispute with MCI, and the arbitrator, if appointed by your office, has no jurisdiction to resolve the claims being made by Matrix. We, therefore, file this Notice of Claim for the sole and limited purpose of seeking a determination as to whether the arbitrator, once appointed, has jurisdiction and the authority to resolve Matrix's claims and grant Matrix the relief it has requested in the Amended Complaint.

In accordance with the Tariff Rules, Matrix has served a copy of the Notice of Claim with MCI, the opposing party, and two copies with your office. In addition, in accordance with Rule 5: Section 7.1321, as amended, we have enclosed a check made payable to the Administrator, J.A.M.S./Endispute in the amount of $1,500. Matrix is submitting this Notice of Claim with the understanding that this submittal is not to be considered an election of remedies by Matrix nor a waiver of its rights to proceed in Court.

In light of MCI's position that Matrix's causes of action shall be resolved by arbitration, Matrix on September 27 executed and submitted a Stipulation (Exhibit E) to MCI whereby Matrix has agreed to arbitrate all the issues and claims set forth in the Amended Complaint if MCI

will likewise agree that all issues in the Amended Complaint are subject to arbitration under Rule 7.1393, that the arbitrator has the right, power and jurisdiction to render the relief sought by the Amended Complaint and that MCI will arbitrate all those claims. As of this date, MCI has not executed the Stipulation. The Stipulation will expire and thereafter be null and void if not executed by MCI by Wednesday, October 2, 1996.

Obviously, if MCI signs the Stipulation, then a ruling by the Administrator is not needed. We desire a resolution of the Submitted Issues within thirty (30) days. Otherwise we will consider that the arbitrator does not have either the jurisdiction or authority to hear the claims of Matrix and grant all the relief requested by Matrix in its Amended Complaint.

Respectfully submitted,

MILLER LAW FIRM, P.C.

/s/ R. W. Miller

Richard W. Miller MO # 16136
Stephen R. Miller MO #33344
Andrew C. Gately MO #42222
4310 Madison Avenue
Kansas City, Missouri 64111
(816) 531-0755
Fax: (816) 561-6361

ATTORNEYS FOR MATRIX COMMUNICATIONS CORPORATION

MCI

RVP-CHI/MCI

AUTHORIZED SALES AGENT AGREEMENT

THIS AGREEMENT made as of October 1, 1995 ("Effective Date"), by and between MCI TELECOMMUNICATIONS CORPORATION ("MCI"), 5 International Drive, Rye Brook, New York 10573, a Delaware corporation, and MATRIX COMMUNICATIONS CORPORATION ("Agent"), with offices located at 4310 Madison Avenue, Kansas City, Missouri 64111.

WHEREAS, MCI wishes to expand entities' access to MCI "1+" Long Distance Service, MCI 800 Service, MCI Hotel Direct Service and the MCI Holiday Inn Program (collectively, "1+/800 Services"), each as described in MCI Tariff FCC No. 1, any state tariffs, inclusive of any amendments thereto and successor tariffs (together, the "Tariff"), as well as such entities' access to MCI Operator Services (each of the above services shall be collectively referred to herein as the "MCI Services"); and

WHEREAS, Agent desires to market the MCI Services set forth herein as an independent Authorized Sales Agent of MCI;

NOW, THEREFORE, the parties agree as follows:

1. Grant of Agency.

Pursuant to the terms and conditions of this Agreement, Agent is hereby appointed an independent agent authorized to solicit, on behalf of MCI, commercial (subject to Paragraph 3 below) entities ("Customers") for MCI Services. The Customers shall be provided the MCI Services sold by Agent hereunder

in accordance with the terms and conditions as set forth in the Special Customer Arrangement entered into by Agent simultaneously herewith and as attached hereto as Exhibit A (the "SCA"), the MCI Holiday Inn Program, the MCI Hotel Direct Program and the Operator Services Agency Agreement entered into by MCI and Agent as of July 1, 1994, and the Operator Services Agency Agreement entered into by Agent and Teleconnect Long Distance Services and Systems Company d/b/a Telecom*USA, each as amended hereby and each of the remaining terms of which are incorporated herein by this reference (the "Operator Services Agreements").

2. Definitions.

Commissionable Revenue. For purposes of this Agreement, Commissionable Revenue shall mean the monthly recurring usage revenues from MCI Services sold by Agent in accordance with the SCA, the MCI Holiday Inn Program, the MCI Hotel Direct Program and the Operator Services Agreements, but do not include: (i) MCI Services sold in conjunction with an MCI Corporate Service Plan ("CSP"), or Competitive Program Responses ("CPR"), or any Special Customer Arrangement other than the SCA; (ii) any MCI charges for goods or services other than Operator Services, that are not tariffed; (iii) pass through access/egress (or related) charges imposed by third parties; (iv) any non-recurring charge imposed in MCI Tariff FCC No. 1; (v) MCI Directory Assistance Services and (vi) any taxes or surcharges applicable to services. Any promotional or other credits granted by MCI shall be deducted from Commissionable Revenue prior to the calculation of commissions hereunder. The effective rate of commissions hereunder shall vary as stated below, in accordance with the monthly revenue derived from the Operator Services

Agreement and the Customers' term commitments under the Holiday Inn Program and the Hotel Direct Program.

3. Sales Agency.

   a. Agent hereby accepts the appointment by MCI as its authorized representative to solicit orders from Customers for the MCI Services subject to the terms and conditions of this Agreement. Agent shall be authorized to solicit orders from non-commercial Customers provided that no more than ___ of Commissionable Revenue may be derived from such non-commercial entities (the "Non-Commercial Limitation"). In the event that Agent exceeds the Non-Commercial Limitation during any month, Customer shall be charged a penalty equal to the greater of (i) ___ of the Commissionable Revenue amount for such month and (ii) ___

   b. Annual Commitment.

      1) 1+/800 Services. After the twelve (12) month ramp-up period ("Ramp Period"), Agent's total Commissionable Revenue from MCI Services for 1+/800 Services shall equal or exceed the following minimum amounts ("Minimum Commissionable Revenue") during each consecutive twelve months of the term of this Agreement ("Year"):

Year	Minimum Commissionable Revenue

      During each Year after the Ramp Period, if Agent's total actual Commissionable Revenue for 1+/800 Services is less than the Minimum Commssionable [sic] Revenue, Agent's earned commissions during that Year shall be reduced by an amount equal to ___ of the difference between the Minimum Commissionable Revenue and the actual Commissionable Revenue.

2) Operator Services. Agent shall produce a Minimum Commssionable [sic] Revenue of ___ per Year of Commissionable Revenue under the Operator Services Agreements, of which no less than ___ shall be attributable to Dedicated Operator Service revenue (the "DOS Subcommitment").

c. Commissions.

MCI shall pay the Agent a commission on monthly Commissionable Revenue from orders for MCI Services solicited by Agent and accepted by MCI, based on the commission tables below:

1) For Commissionable Revenue derived from 1+/800 Services sold pursuant to the Holiday Inn Program or the Hotel Direct Program, Agent shall earn the following commissions, based on the Customer's term commitment:

Program	Customer Term	Commission
Holiday Inn Program		
Hotel Direct Program		

2) For Commissionable Revenue derived from 1+/800 Services sold pursuant to the SCA, Agent shall earn the following commissions:

MCI Service	Commission
MCI Vnet (Interstate-Switched)	%
MCI Vnet (Interstate-Dedicated)	%
MCI Vnet Intrastate	%
MCI Vnet International	%
MCI 800 – Dedicated Access Line	%
MCI 800 – Common Business Line	%
MCI 800 Intrastate	%
MCI 800 International	%

3) Following the Ramp Period, Agent shall earn the following commissions for Commissionable Revenue derived from Operator Services, in lieu

of all commission or other such schedules provided for in the Operator Services Agreements:

(a) Switched Operator Services:

Monthly Operator Services Revenue	Commission Rate
$	%
$	%
$	%
$	%
$	%
$	%

During the Ramp Period, Agent shall earn commissions at the rate of ___ of all Switched Monthly Operator Services Revenue.

(b) Dedicated Operator Services:

Monthly Operator Services Revenue	Commission Rate
$	%
$	%
$	%
$	%

During the Ramp Period, Agent shall earn commissions at the rate of ___ of all Dedicated Monthly Operator Services Revenue.

In any Year that Agent fails to achieve the DOS Subcommitment, MCI shall charge Customer an underutilization charge in the amount of ___ of the difference between Customer's actual Dedicated Operator Services Revenue for such Year and the DOS Subcommitment.

4) MCI 1-800 COLLECT and MCI Calling Card (collectively, "Dial-Around Services") usage by Customers shall be included in the calculation of

Minimum Commissionable Revenue as follows: In lieu of determining calculations on an account (ANI) basis, MCI shall calculate the Dial-Around Services usage on the Master Agent Level (Level Three). The parties agree that no more than ___ of the Minimum Commissionable Revenue shall be attributable to Dial-Around Services Revenue. [Agent agrees that only usage from ANIs PIC confirmed by the LEC or usage from ANIs that have a signed LOA on file with MCI shall be included in the calculation of Minimum commissionable Revenue.]

5) Agent's commissions hereunder are in lieu of any promotions which might otherwise be available to Customers. If Customers receive any promotions, or if the promotions are changed, Agent's commissions shall be adjusted. All pertinent terms and conditions of the Holiday Inn Program and Hotel Direct Program shall apply, including those pertaining to right of set-off. If Agent's commissions are adjusted as specified above and if the amount of commissions paid by MCI exceeds the adjusted amount of commissions for any reason, Agent shall repay to MCI the difference between the commissions actually received and the amount of the adjusted commissions. The excess commissions shall be repaid by MCI withholding from Agent's subsequent commission payments an amount equal to one hundred percent (100%) of the amount to be repaid in the month immediately following the commission adjustment.

d. Unless otherwise agreed in writing by MCI, commission shall not be payable for monthly usage derived from any person or entity that was an MCI customer at the time of order solicitation or

within thirty (30) days prior thereto; provided, however that Agent shall be entitled to receive commissions on those MCI customer accounts which were solicited by Agent commencing September 1, 1995. Commission shall not be payable on monthly usage derived from any person or entity that is an MCI National or Multinational account. Commission shall not be payable on any usage derived from any person or entity controlled by Agent.

e. Agent shall not solicit orders by means of telemarketing without prior written consent of MCI. If Agent solicits by means of telemarketing, Agent shall coordinate with MCI to ensure that no PIC change order resulting from telemarketing is submitted without confirmation by one of the means required by FCC regulations. MCI may take steps to confirm compliance with this provision including without limitation contacting MCI customers solicited by Agent.

f. Agent may not delegate all or any portion of the agency appointment under this Agreement to any third party without prior express written consent of MCI and under a written agreement satisfactory to MCI. Breach of this provision shall be deemed an irregular marketing activity. MCI shall not be liable to pay commissions under this Agreement or otherwise for revenue generated by any unauthorized subagent.

4. Relationship of Parties.

a. Agent will have no authority to bind MCI by contract or otherwise or to make representations as to the policies or procedures of MCI other than as specifically authorized by this Agreement. MCI and Agent acknowledge and agree that their agency relationship arising from this Agreement

does not constitute or create a general agency, joint venture, partnership, employee relationship or franchise between them and that Agent is an independent contractor with respect to the services provided by it under this Agreement.

b. Agent will identify itself as an Authorized Sales Agent of MCI only with respect to the MCI Services and will otherwise identify itself as an independent business. Unless specifically authorized in writing, neither MCI nor Agent will make any express or implied agreements, guarantees or representations, or incur any debt, in the name of or on behalf of the other.

c. Agent's employees will not be or be deemed to be MCI employees or joint employees. Agent assumes full responsibility for the acts of its employees and for their supervision, daily direction and control. MCI will not be responsible for worker's compensation, disability benefits, unemployment insurance, withholding taxes, social security and any other taxes or benefits for Agent's employees.

5. Training and Certification.

a. MCI shall provide product sales training for each of the MCI Services as provided for in Exhibit B. Agent and Agent employees may not solicit orders for any MCI Service until trained in product sales for that product by MCI.

b. Any additional training and charges for training will be mutually agreed upon by the Parties.

6. Sales Aids.

a. MCI will provide Agent with an initial sales kit that includes a program description, sales literature, sales aids, and order forms to be used by

Agent in its activities as provided by this Agreement. The purchase price of additional sales kits shall be at rates specified by authorized MCI Agent Program personnel.

b. Agent shall use MCI-approved marketing materials and order forms only.

c. AGENT SHALL MAKE NO REPRESENTATIONS OR WARRANTIES RELATING TO THE SERVICES EXCEPT AS SET FORTH IN SALES LITERATURE APPROVED IN WRITING BY MCI OR AS SET FORTH IN THE FORM OR FORMS OF ORDERS PROVIDED AGENT BY MCI, OR AS OTHERWISE EXPRESSLY PERMITTED BY MCI.

7. Reporting; Payment.

a. MCI will provide Agent with monthly commission reporting, which will include the usage of each Customer solicited by Agent and for which commission is due hereunder. Exhibit C sets forth an example of such reports, which may vary.

b. MCI will pay commissions monthly. MCI will use reasonable efforts to calculate and pay commissions sixty (60) days after close of an applicable billing month.

8. Order Acceptance.

Agent expressly acknowledges that its appointment hereunder is as a sales representative for MCI Services offered by MCI, that any solicitation by Agent of orders from Customers for the MCI Services will be subject to MCI's acceptance, in its sole discretion, of such orders and the availability, from time to time, of the MCI Services, and that MCI will have no responsibility or liability whatsoever to Agent with respect to the continued availability or operation of

the MCI Services or MCI's acceptance of, or failure to accept, orders therefore from Customers solicited by Agent. (By way of example, and not limitation, in the event that MCI makes a business decision not to continue to generally offer to its Customers a specific type of service that is currently offered, Agent may not validly make a claim that MCI has an obligation to continue to provide such withdrawn service. MCI, however, shall endeavor to offer Agent and therefore, the Customers, a comparable service as a replacement.)

9. Standards of Conduct.

In performing duties under this Agreement, Agent will observe the highest standard of integrity and fair dealing with members of the public. Neither MCI or Agent will do anything which would tend to discredit, dishonor, reflect adversely upon or in any manner injure the reputation of the other.

10. Trade names and Trademarks.

a. During the term of this Agreement, unless otherwise instructed by MCI, Agent may refer to itself as an MCI Authorized Sales Agent, but solely in connection with the marketing of MCI Services to Customers hereunder. Agent may use MCI marks, trade name, and logo design only in marketing materials, advertising, and promotional literature (collectively, "Materials") in conjunction with its sale of MCI products and services to commercial Customers, provided that any usage of any MCI mark or trade name in such Materials and the advertising claims associated therewith, in each instance, has been approved in writing in advance by MCI. Anything to the contrary notwithstanding, Agent shall not use the MCI marks, trade names or logos in any Materials for

the marketing to non-commercial Customers in any instance whatsoever.

b. Agent acknowledges and agrees that: (i) the marks are owned by MCI, (ii) it will do nothing inconsistent with such ownership, (iii) all use of the MCI marks by it shall inure to the benefit of and be on behalf of MCI, (iv) that nothing in this grant shall give it any right, title or interest in MCI marks other than the right to use the marks in accordance herewith, (v) it will not attack MCI's title to the marks or the validity of this grant, and (vi) further agrees to use MCI marks only in the form and manner prescribed from time to time by MCI, and not to use any other trademark or service mark in combination with any of MCI's marks without the prior written approval of MCI.

c. This grant of a limited, nonexclusive authorization may not be assigned to any other entity or party without the prior written approval of MCI.

d. Agent agrees, at its own expense, to defend, indemnify and hold MCI harmless from and against any and all claims, suits, actions, proceedings, judgments, damages, liabilities, costs and expenses (including attorneys' fees) arising either from use of MCI marks by Agent or any third party authorized by Agent or advertising claims made in connection therewith, other than a claim based on an assertion by a third party either that MCI does not own the marks and/or does not have the right to grant the authorization provided herein, or that the substance of an advertising claim approved by MCI is materially false or misleading.

e. Upon termination of this Agreement, any permission or right to use Marks granted hereunder will

cease to exist and Agent will immediately cease any use of such marks and immediately cease referring to itself as an MCI Authorized Sales Agent.

11. Advertising Review.

a. Agent shall under no circumstances advertise MCI's products and services without prior written approval.

b. Agent agrees to submit all advertising, claims language and marketing materials (including but not limited to business letterhead, business cards, print, radio or television advertising, press releases, flyers, brochures, posters and LOAs) for prior written approval to:

Senior Manager
Agent Marketing
MCI Telecommunications
205 N. Michigan Ave.
Chicago, IL 60601
Phone: 312/616-5030
FAX: 312/819-6730

With Copies To: Robert Rodrigues 0608/003
MCI Communications Corporation
1133 19th Street, NW
Washington, DC 20036

12. Non-Competition/Confidentiality.

a. During the term of this Agreement, Agent will not promote, sell or provide leads to Customers for the operator services of any other person or entity and shall limit its promotion to Customers of another long distance provider's "1+" or such similar service to no more than twenty-five percent (25%) of Agent's aggregate telecommunications marketing activities.

b. After normal expiration of the term hereof or if MCI terminates this Agreement pursuant to 13(a)(i), Agent will not promote, sell or provide leads to current MCI Customers for the operator services of any other person or entity that offers such services identical or similar to the MCI Operator Services for as long as MCI is paying a commission under this Agreement but in no event fewer than ninety (90) days after termination.

c. Upon termination for any other reason, Agent will not promote, sell or provide leads to Customers for the operator services of any other person or entity that offers services identical or similar to the MCI Operator Services for as long as MCI is paying a commission under this Agreement but in no event fewer than ninety (90) days after termination.

d. Any confidential specifications, drawings, sketches, data billing, network, technical or business information, and any other confidential material ("Information"), furnished or disclosed by MCI to Agent hereunder, will be deemed the exclusive property of MCI and must be returned to MCI upon termination of this Agreement. Any customer names or lists or other information provided by Agent to MCI shall be deemed the property of Agent and shall be returned to Agent upon termination of this Agreement.

e. During the term of this Agreement and for a period of three (3) years after termination of this Agreement, Agent agrees not to reveal, divulge, make known, sell, exchange, lease or in any other way transfer any Information to any third party or to utilize such Information in direct or indirect competition with MCI or any of its other Agents.

Agent agrees that monetary damages for breach of its obligations under this Section may not be adequate and that MCI will be entitled to injunctive relief with respect thereto.

13. Term and Termination.

a. The term of this Agreement is six (6) years commencing on the Effective Date and will thereafter be renewed automatically for an additional term of one (1) year unless either party notifies the other in writing of its desire to terminate the Agreement at least ninety (90) days prior to the expiration of the initial term or any additional term thereafter. The first twelve (12) months of the term is the Ramp Period. This Agreement may be terminated: (i) for breach of any provision of this Agreement provided that written notice of such breach has been given to the breaching party and such breach has not been cured within thirty (30) days after delivery of such notice; and (ii) upon ten (10) business days notice by MCI in the event MCI discovers any irregular marketing activity by Agent or irregular customer activity by Customers solicited by Agent. If MCI terminates this Agreement pursuant to Sections 13.a.(i) or 13.a.(ii) or Agent terminates this Agreement for reasons other than for cause, Agent shall pay to MCI an amount equal to ten percent (10%) of the Minimum Commissionable Revenue described herein, multiplied by the number of months remaining in the term, and a pro rata portion thereof for any partial month.

b. After normal expiration of the term, MCI shall continue to pay commissions for a period of six (6) months at the commission rate applicable

under Section 3(c) hereof (direct sales commissions) for the last full month prior to expiration on monthly usage revenues calculated in accordance with Section 2. Upon early termination hereof for any reason, MCI's commission payment obligations shall cease.

14. Insurance.

Agent will at all times during the term of this Agreement, at Agent's sole expense, maintain comprehensive liability insurance against claims for bodily and personal injury, death, property damage and all other harm caused by or occurring in connection with Agent's acts, omissions and/or misrepresentations. Such insurance will name MCI as an additional insured in the amount of One Million Dollars ($1,000,000) per occurrence. Each such insurance policy will provide for not less than thirty (30) days prior notice to all insureds of any modification, cancellation or nonrenewal. Upon request of MCI, Agent will furnish proof satisfactory to MCI that insurance coverage required is in effect.

15. Limitation of Liability.

a. Agent agrees to defend and hold MCI free and harmless from any loss, damage, liabilities, cost, or expenses including legal expenses and counsel fees, that MCI may become liable for by reason of any act of Agent in marketing MCI Services, including but not limited to misrepresenting to Customers the Services or the terms under which the Services are made available by MCI, for breach of this Agreement, or for irregular marketing activities.

b. MCI will have no liability to Agent for commissions that might have been earned hereunder but for the inability or failure of MCI to provide MCI

Services to any person solicited by Agent or in the event of discontinuation or modification of the MCI Services.

c. Agent acknowledges and agrees that MCI directly or through other sales agents may offer MCI Services and that Agent will be entitled to no compensation for sales made through such other channels. In the event MCI receives conflicting orders for services from different agents or MCI employees, MCI shall determine who will receive credit for such orders. In the event of such conflicts relating to orders for MCI Services, MCI may in its discretion compensate Agent as if the order were for a service subject to commission. In the event that Agent is in disagreement with MCI's determination, Agent may elect to arbitrate such dispute as provided for in Paragraph 22 below. Agent shall be obligated to pay all of MCI's reasonable attorney's fees and costs, including allocable costs of in-house counsel, incurred in connection with a successful MCI finding.

d. NEITHER PARTY WILL BE LIABLE TO THE OTHER FOR SPECIAL, INDIRECT, CONSEQUENTIAL, DAMAGES, WHETHER OR NOT FORESEEABLE, OR PUNITIVE DAMAGES.

16. Notices.

Notices to be given pursuant to this Agreement will be in writing and will be deemed to have been duly and properly given on the earlier of (a) the date such notice has been received or (b) five (5) days after deposit of such notice in the United States Mail, postage prepaid, to be delivered by certified mail, return receipt requested, addressed to the Agent at the address given above or at such address as it may

designate in writing from time to time and addressed to MCI at:

Director, Alternate Channels
Agent Sales
MCI Telecommunications Corporation,
Business Markets
Three Ravinia Drive
Atlanta, Georgia 30346

Copy To: MCI Telecommunications Corporation
5 International Drive – 3rd Floor
Rye Brook, New York 10573
Attn: Legal Department

or at such address it may designate in writing from time to time.

17. Compliance with Law.

a. Agent will, at its own expense, operate in full compliance with all laws, rules and regulations applicable to, and maintain in force all licenses and permits required for, its performance under this Agreement.

b. Agent will notify MCI in writing immediately of the commencement or threatened commencement of any action, suit or proceeding, and of the issuance or threatened issuance of any order, writ, injunction, award or decree of any court, agency or other governmental instrumentality, involving Agent's activities under this Agreement or which may affect Agent's ability to perform its obligations hereunder.

18. Non-Waiver.

No failure by either party to take action on account of any default by the other will constitute a waiver of any such default or of the performance required of the other.

19. Impossibility of Performance.

Neither MCI nor Agent will be liable for loss or damage or deemed to be in breach of this Agreement if its failure to perform its obligations results from (a) compliance with any law, ruling, order, regulation, requirement of any federal, state or municipal government or department or agency thereof or court of competent jurisdiction; (b) acts of God; (c) acts or omissions of the other party; (d) fires, strikes, war, insurrection or riot; (e) or any other cause beyond its reasonable control. Any delay resulting therefrom will extend performance accordingly or excuse performance, in whole or in part, as may be reasonable.

20. Binding Effect.

This Agreement will be binding upon and inure to the benefit of the parties, their successors and assigns; provided, however, that Agent may not assign or otherwise transfer this Agreement or any of its interest herein without the prior and express written consent thereto by MCI. Neither the whole nor any part of the interest of Agent in this appointment will be transferred or assigned by operation of law.

21. Severability.

No provision of this Agreement which may be deemed unenforceable will in any way invalidate any other provisions of this Agreement, all of which will remain in full force and effect.

22. Arbitration.

Any dispute relating to this Agreement shall be submitted for binding arbitration in accordance with the rules contained in MCI Tariff FCC No. 1 and judgement on any award entered therein may be entered in any court of competent jurisdiction.

23. Controlling Law and Entire Agreement.

This Agreement, with Attachments will be governed by the domestic laws of the State of New York. This Agreement, with Attachments and the Operator Services Agreement constitutes the entire Agreement between Agent and MCI with respect to the subject matter hereof; and supersedes all prior Agreements and representations, written or oral, concerning the subject matter herein. In the case of a conflict between the terms set forth herein and those set forth in the Operator Services Agreements, the terms herein shall govern. This Agreement cannot be changed or modified except by written amendment signed by Agent and MCI.

24. Headings.

The section numbers and captions appearing in this Agreement are inserted only as a matter of convenience and are in no way intended to define, limit, construe or describe the scope or intent of such sections of this Agreement, or in any way affect this Agreement.

This offer shall remain open and capable of being accepted by Customer through September 22, 1995, after which date it is withdrawn.

MATRIX COMMUNICATIONS CORPORATION	MCI TELECOMMUNICATIONS CORPORATION
/s/ James Miller Signature	/s/ Gordon Bouska Signature
/s/ James G. Miller Printed Name	/s/ Gordon T. Bouska Printed Name
President Title	Director Title
September 22, 1995 Date	10/23/95 Date

CONTRACT FOR ARBITRATION ADMINISTRATION SERVICES

THIS CONTRACT FOR ARBITRATION ADMINISTRATION SERVICES ("Contract") is made as of JUNE 23, 1994, by and between the parties, MCI COMMUNICATIONS CORPORATION ("MCI") and ENDISPUTE, Inc. ("ENDISPUTE"), and is executed by the duly authorized representatives of each.

Whereas, MCI wants to establish a program for the nationwide arbitration of certain commercial disputes under its publicly-filed tariffs.

Whereas, neutral, efficient and economical administration is essential to such a program, and

Whereas, ENDISPUTE represents that it is fully qualified and prepared to provide such administration services under this Contract,

THE PARTIES HEREBY AGREE:

I. SCOPE

This Contract covers nationwide administration services for the arbitration of customer payment disputes over $10,000.00. These disputes are subject to arbitration under MCI's tariffs. The tariff provision contains the rules and procedures which will govern the arbitration proceedings. A copy of the tariff provision ("MCI's Arbitration Rules") is annexed hereto as Attachment A.

II. INDEPENDENT CONTRACTORS

The parties are independent contractors. Each is engaged in a business which is independent from the other.

III. TERM

The initial term of this Contract shall commence on June 23, 1994 and end on June 30, 1995. Unless either party receives written notice to the contrary from the other at least sixty (60) days prior to the expiration of the initial term, this Contract shall be automatically renewed for the term of one year, and shall continue to be automatically renewed thereafter for successive year-long extensions in like manner until such time as notice of non-renewal for the succeeding year is received in accordance with this Section.

IV. ENDISPUTE SERVICES

ENDISPUTE will provide the following services, as they may be more fully detailed in this Contract or in MCI's Arbitration Rules.

A. Administration of arbitration proceedings:

In administering arbitration proceedings under this Contract, ENDISPUTE will abide by MCI's Arbitration Rules, which are on file with the Federal Communications Commission and which may be modified from time to time in accordance with law and thereby affect the procedures for arbitrating claims and the scope of MCI's arbitration program. MCI will provide ENDISPUTE with any tariff modifications that may affect any portion of this Contract or the arbitration program. In the event of any conflict between the express terms and conditions of this Contract and MCI's Arbitration Rules, the Rules shall control.

1. Assignment of a Case Manager to each matter;

2. Appointment of an arbitrator to each matter;

3. Scheduling and coordination of hearings;

4. Resolving procedural disputes;

5. Management of communication among parties, and between parties and arbitrators; and

6. Such other functions as may be from time to time necessitated by revisions to MCI's Arbitration Rules, upon reasonable charges therefor negotiated and effectuated by amendment to this Contract.

B. Appointment of a Contract Administrator to supervise the administration of this Contract.

C. Development and management of a centralized case scheduling and tracking system.

D. Development and management of an electronic docketing system.

E. Development and management of a 24 hour-a-day, On-Line Case Information Service.

F. Development and management of a Telephonic Information Service which will be operational during defined business hours.

G. Coordination and training of a qualified panel of commercial arbitrators.

H. Provision of weekly reports.

I. Evaluation of the Program's administration and development of recommendations for improvements after six (6) months of operation, with quarterly reviews thereafter.

V. PERSONNEL AND FUNCTIONS

A. *Dispute Systems Designer:* During the first forty-five (45) days of the initial term of the Contract, ENDISPUTE will provide an experienced Dispute System Designer to consult with MCI on the development of forms, reports, billing, and rebate systems. This designer will work closely with MCI to design case management systems that will meet the needs of all the parties. This designer will develop arbitrator screening forms and will train the Contract Administrator and Case Managers in effective case management under MCI's Arbitration rules.

B. *Technical Professional:* ENDISPUTE will provide a technical support professional on an as-needed basis to ensure that the computer system meets the needs of all the parties. This technical professional will work closely with the Contract Administrator and MCI computer experts to resolve any technical issues which may arise during the administration of the Contract. ENDISPUTE will ensure that the computer systems it develops will run smoothly and efficiently at all times.

C. *Contract Administrator:* Upon signature of this Contact, ENDISPUTE will appoint a Contract Administrator located in Washington, D.C. to manage the MCI program.

1. Endispute will select an administrator with the following experience: demonstrated successful management experience, demonstrated experience in the design and administration of Alternative Dispute Resolution ("ADR") systems, familiarity with telecommunications or capacity to develop

such familiarity within a short time, demonstrated understanding of commercial contracts, law degree or equivalent professional experience in the resolution of legal matters, and excellent written and oral communications skills.

2. The Contract Administrator will be responsible for the supervision of the start-up phase of the program, the training and development of an arbitrator panel, the establishment of the electronic docket, customer service and support, and continuing management of the program.

3. The Contract Administrator will be accessible to MCI's Office of General Counsel ("OGC") and the parties for questions regarding everyday management of the program, and for periodic meetings with OGC staff regarding management of the program over time.

D. ***Case Manager:*** ENDISPUTE will promptly appoint a Case Manager to handle the administration of each arbitration submitted under this program.

1. Endispute will select a Case Manager using the following criteria: paralegal or equivalent professional experience, demonstrated commitment to customer service, experience in administration or case management, attention to detail, and absence of any conflict of interest with MCI or the other party to an arbitration.

2. The Case Manager will ensure that cases are administered in accordance with MCI's Arbitration Rules and that the parties to

each arbitration have ongoing access to current information about their cases. The Case Manager will be responsible for appointing an arbitrator, scheduling prehearing conferences, coordinating information exchange; notifying the parties of dates of hearings and deadlines, managing an efficient exchange of information between the parties and the arbitrator, and maintaining accurate and up-to-date case records. The Case Manager will be available during the course of the proceedings to educate the parties on the process, to resolve disputes between the parties regarding location of hearings and objections to arbitrators, and to answer any questions regarding administrative matters. The Case Manager will be trained in MCI's Arbitration Rules and the requirements of the parties for timely notification and information access.

3. No Case Manager nor any other ENDISPUTE personnel shall respond to inquiries concerning the merits of any proceeding. The Case Manager shall forward all such inquiries to the arbitrator. MCI customer inquiries about MCI billing practices, past due balances, MCI service products, or settlement shall be referred to the OGC attorney handling the arbitration or the MCI Arbitration Coordinator.

4. At the option of ENDISPUTE, the Case Manager's duties may be spread among up to three trained Case Managers in the Washington, D.C. office. Regardless of the number of case managers serving at any

one time, ENDISPUTE shall ensure continuity of service.

ENDISPUTE will promptly reassign or replace any ENDISPUTE personnel who do not adequately perform the services described in this section.

VI. CENTRALIZED CASE SCHEDULING AND TRACKING SYSTEM

For the efficient administration of cases, ENDISPUTE will use a centralized case Scheduling and tracking database located in ENDISPUTE's Washington, D.C. office. ENDISPUTE will use its internal system for the scheduling and tracking of cases, which shall be modified to the extent necessary to meet the requirements of the parties in arbitrations under this Contract. Such system, including any modifications thereto, shall remain the sole property of ENDISPUTE.

VII. ELECTRONIC DOCKET

ENDISPUTE will develop an electronic docketing system to provide current information on the status of each case, including hearing dates, and pertinent deadlines. Each time there is a change in the status of a case, a deadline set, or a decision made that affects what the parties must do, the Case Manager will immediately update this information in the electronic docketing system. The Case Manager will make such updates on weekdays during the hours of 9:00 a.m. to 5:30 p.m. Eastern Standard or Daylight Savings Time as the case may be. The electronic docketing system shall be the sole property of ENDISPUTE. This ownership, however, shall not restrict MCI's right to develop or obtain from another source the same or a similar electronic docketing system for use in its nationwide

arbitration program. Nor shall this ownership preclude MCI, whether alone or in conjunction with another provider of arbitration administration services, from using fully any commercially available software in a configuration or design similar to that used by ENDISPUTE in its electronic docketing system.

VIII. ON-LINE SERVICES

A. ENDISPUTE will provide all parties to arbitrations with 24-hour, on-line access to the Electronic Docket. ENDISPUTE will establish a communications server in its Washington, D.C. office which will include two dedicated phone lines for MCI and opposing parties to access the Electronic Docket. This On-Line Case Information Service will allow any party with a modem to dial into the Electronic Docket and obtain up-to-date information on its case at any time. This system shall be the sole property of ENDISPUTE. This ownership, however, shall not restrict MCI's right to develop or obtain from another source the same or a similar on-line access system for use in its nationwide arbitration program. Nor shall this ownership preclude, MCI, whether alone or in conjunction with another arbitration services provider, from using fully any commercially available software in a configuration or design similar to that used by ENDISPUTE for its On-Line-Case Information Service.

B. To protect the security and confidentiality of case information, access to the Electronic Docket will be controlled through the use of passwords which will restrict a party's access solely to its matter(s). To assist the OGC in the administration of cases, this system will

include a global password which will enable the OGC to view information on all active MCI cases in the database. Once inside the system, parties will be able to read and download information as needed.

C. ENDISPUTE will also establish an MCI Mail account, which account shall be paid by MCI. ENDISPUTE will use MCI Mail to correspond with the OGC on all matters except that the use of MCI Mail shall not constitute service under MCI's Arbitration Rules.

IX. TELEPHONE CASE INFORMATION SERVICE

In addition to the Electronic Docket and the On-line Case Information Service described above, ENDISPUTE will establish a Telephonic Case Information Service using an MCI 800 number. This Telephonic Case Information Service will be staffed by a Case Manager with access to the Electronic Docket. This service will ensure that all parties have access to current case information from 9:00 AM to 5:30 PM Eastern Standard or Daylight Saving Time as the case may be. Upon MCI's request, ENDISPUTE will extend these hours to accommodate parties on the West Coast. Charges for the 800 number line will be paid by MCI.

X. WEEKLY REPORTS

ENDISPUTE will provide weekly reports to the OGC Arbitration Coordinator listing the following information:

A. The titles of all current arbitration;

B. The initials of the OGC attorney and legal assistant handling each matter;

C. The date and description of the next major event to occur in each matter; and

D. Each arbitration's current status.

This report will follow the format of the On-Line Case Information database. ENDISPUTE shall also provide for the electronic transfer of this information in a format which MCI can use in its internal administration of the program. For instance, ENDISPUTE will incorporate into its case tracking system the internal MCI reference number assigned to each case.

XI. INITIAL SIX MONTH REPORT AND QUARTERLY REPORTS

Prior to January 31, 1995, ENDISPUTE will provide MCI a written review of the first six (6) months of active administration (through January 13, 1995). Endispute shall be available to discuss this report on the request of MIC. This report will contain an overview of the first six (6) months, including: analysis of settlement and no-response rates; analysis of the accuracy of time estimates for provision of services and suggestions for any possible revisions to these estimates; and recommendations to MCI regarding improvements. Thereafter, such reports shall be provided at the conclusion of each quarter.

XII. ARBITRATOR PANEL

ENDISPUTE will select and maintain a panel of experienced, commercial arbitrators capable of handling disputes nationwide. The panel shall be expanded if the need arises for additional arbitrators. ENDISPUTE shall replace arbitrators who are no longer available or qualified for service, if warranted by the volume of arbitrations.

A. Arbitration panelists shall be selected by ENDISPUTE based on the following criteria:

relevant experience in the resolution of commercial disputes through the use of ADR, relevant arbitration experience including the application of law in rendering awards, absence of conflicts of interest with MCI, demonstrated neutrality and impartiality in professional practice as an ADR practitioner, and geographic location. These neutral arbitrators may include attorneys, retired judges, non-attorney specialists, and other professionals.

B. ENDISPUTE will train arbitrators in the administration of cases under MCI's Arbitration Rules. ENDISPUTE arbitrators shall be sufficiently trained and experienced to enable them to provide the kind of arbitration services which are required under MCI's Arbitration Rules.

C. ENDISPUTE will ensure that arbitrators serving on the MCI panel have been screened for potential conflicts of interest with MCI prior to inclusion on the panel. When appointed to a particular proceeding, arbitrators will be required to disclose any conflicts of interest with MCI which may have developed during the interim since the arbitrator's inclusion on the panel. In addition, arbitrators will be screened prior to appointment to a particular arbitration for potential conflicts with the MCI customer who is a party to the case.

D. Arbitrators selected for the panel will be required to complete an oath of office at the time of appointment to a case and will agree to abide by the Code of Ethics for Commercial Arbitrators, as outlined in MCI's Arbitration Rules.

E. All awards shall be in writing and signed and dated by the Arbitrator. As to each claim, the award shall state which party prevailed and the amount awarded or other relief granted, and shall direct payment of any amount due the prevailing party. The award shall not include any findings of fact or conclusions of law.

XIII. PROGRAM DEVELOPMENT DEADLINES

Time is of the essence in the performance of this Contract:

A. The Electronic Docket shall be functioning satisfactorily by July 29, 1994.

B. All On-line Services shall be functioning satisfactorily by July 29, 1994.

C. The Telephone Case Information Service shall be functioning satisfactorily by July 29, 1994.

D. The initial arbitrator panel shall be selected and ready to accept cases by July 29, 1994.

XIV. INSURANCE

ENDISPUTE shall maintain arbitrators and mediators professional liability insurance during the initial term and any renewal terms of this Contract. Such insurance shall provide individual claim coverage of least $1.0 million and aggregate claims coverage – for all claims made in a year – of at least $1.0 million. For the initial term and any renewal terms of this Contract. ENDISPUTE shall also maintain commercial general liability insurance. This insurance shall provide general total coverage of at least $2.0 million.

ENDISPUPTE shall submit certificates of insurance to MCI and shall permit any authorized representative of MCI to examine its original insurance policies should MCI so reasonably request. Should such insurance be cancelled or non-renewed, MCI shall be promptly notified and shall have the right to terminate the contract.

XV. CHARGES

A. ENDISPUTE shall obtain MCI long distance services for use in connection with the Telephonic and On-Line Case Information Services. MCI will reimburse ENDISPUTE for these charges pursuant to monthly invoice as described in Subsection C., below. MCI will also reimburse ENDISPUTE pursuant to monthly invoice as described in Subsection C. below, for the charges associated with the two dedicated phone lines used to access the Electronic Docket. MCI shall also provide an MCI Mail account to ENDISPUTE free of charge for use in administering the arbitration services under this Contract. Any dispute arising out of the provision of any such services by MCI shall not be considered a dispute arising out of this Contract and shall not be considered grounds for termination of this Contract.

B. ENDISPUTE shall be compensated as follows:

1. *Initial Start Up Fee* – to cover administration design, computer services and technical support:

   Forty thousand dollars ($40,000.00), payable upon signature of this Contract, and not applicable to any subsequent one-year renewals of this Contract.

2. *Monthly Maintenance Fee* – for twelve (12) months, starting with the month running July 1 through July 31, 1994, upon invoice as indicated below:

Contract Administrator	$4,750.00 per month.
Technical Support	$1,000.00 for the first six (6) months only.
Other Expenses	$250.00 per month.

(For the initial term of this Contract, the total Monthly Maintenance Fee is six thousand dollars ($6,000.00) per month for the first six months – July 1, 1994 to December 31, 1994. Thereafter, from January 1, 1995 to June 30, 1995, it is five thousand dollars ($5,000.00) per month. Total Monthly Maintenance Fees for the initial term, exclusive of additional charges as provided below, are sixty-six thousand dollars ($66,000.00))

3. *Arbitrator and Case Management Fees:*

The filing fees in Rule 5 of MCI's Arbitration Rules, control the arbitrator and case management fees to be paid by the parties. ENDISPUTE shall invoice MCI for MCI's fees as indicated in Subsection C., below.

Endispute will bill for arbitrator services beyond the two or four days provided by Rule 5 at a half-day rate of eight hundred dollars ($800.00), or a full-day rate of one thousand six hundred dollars ($1,600.00). Proceedings lasting beyond five (5) hours

in any one day shall be considered full-day proceedings. The parties shall share equally the cost of extra hearing days and shall pay the full-day rate of $1,600.00 in advance of each extra day. If the extra day ends before five (5) hours, then ENDISPUTE shall immediately refund eight hundred dollars ($800.00) to the paying parties, prorated as appropriate. ENDISPUTE will notify the parties to each arbitration about this fee structure for extra hearing days prior to the start of every arbitration hearing.

4. *Arbitrator Travel Costs:*

Arbitrator travel costs will be split equally by the parties to the arbitration. ENDISPUTE will do everything possible to minimize these costs by having arbitrators available in a wide variety of locations, by using telephonic hearings when the parties agree, and by scheduling cases that require travel in batches, if possible.

For cases requiring arbitrator travel, ENDISPUTE will estimate the travel costs and will split them equally between the parties to the arbitration with the requirement that the parties pay these costs to ENDISPUTE no later than three (3) days before the arbitration hearing. ENDISPUTE will refund any unused travel costs to the parties within five (5) days of the conclusion of the hearing. Arbitrators shall document all expenses over twenty-five dollars ($25.00) as a condition to reimbursement and shall file written claims for all expenses regardless of the requirement for documentation.

Under Rule 31(c) of MCI's Arbitration Rules, the arbitrator may assess arbitrator travel costs against MCI or the opposing party. Such assessment shall be embodied in the award and shall not exceed actual costs. In the event of such an award of costs. ENDISPUTE shall have no obligations to either MCI or the opposing party to return any funds paid in advance for travel costs, except those unused. It shall be up to MCI or the opposing party, as the case may be, to collect or enforce an award of arbitration travel costs. In the event a non-MCI party refuses to pay arbitrator travel fees, MCI will reimburse ENDISPUTE for this cost, provided ENDISPUTE assigns any rights it may have against that party to MCI.

5. *Additional Charges:*

   a. If ENDISPUTE receives more than one hundred (100) cases during the five-month period beginning August 1, 1994 and ending December 30, 1994, then MCI will pay an additional fee of one hundred dollars ($100.00) for each case over one hundred (100). For the next six-month period, commencing January 2, 1995 and ending June 30, 1995, and for any subsequent six month periods, MCI will pay an additional fee of one hundred dollars ($100.00) for each case over one hundred twenty (120).

b. ENDISPUTE will charge a postponement fee of two hundred dollars ($200.00) per postponement to the party requesting the postponement. This fee will cover the additional administrative expense incurred by ENDISPUTE for the postponement and rescheduling of the hearing.

6. *Rebate:*

If an MCI customer fails to respond under MCI Arbitration Rule 11(a), ENDISPUTE shall rebate to MCI eighty percent (80%) of the applicable filing fee, provided that ENDISPUTE retains a minimum of three hundred dollars ($300).

a. If a case settles before or on the day of the pre-hearing conference, ENDISPUTE shall rebate to the paying parties seventy percent (70%) of the filing fee.

b. If a case settles after the pre-hearing conference but prior to two days before the scheduled hearing, ENDISPUTE shall rebate to the paying parties sixty percent (60%) of the filing fees.

c. Rebates will be computed and paid to MCI (and opposing parties where appropriate) monthly.

C. *Invoices:* ENDISPUTE shall issue monthly invoices to MCI for the following:

1. Monthly Maintenance Fees.

3. Reimbursement of MCI long distance service charges and charges for the two dedicated phone lines used in accordance with Section XV.A., above.

ENDISPUTE may invoice MCI for the arbitrator and case management fees payable under MCI Arbitration Rule 5 immediately upon ENDISPUTE's receipt from MCI of a Notice of Claim or Counterclaim.

All invoices shall itemize the nature of the charges and the dates incurred. If such charges relate to specific arbitrations, the invoices shall indicate the proceeding and the date upon which the service was rendered. ENDISPUTE invoices shall be due and payable by MCI forty-five (45) days after the date of receipt. Payments and invoices shall be sent to the addresses designated for receipt of notices under this Contract.

D. Should MCI dispute any portion of any invoiced amounts, MCI shall notify the Contract Administrator in writing as soon as possible, but in any event no later than the payment due date. Without limitation as to other grounds, lack of required specificity under subparagraph (c) shall be grounds to dispute the charges. Non-payment of disputed amounts shall not be considered grounds for termination of this Contract.

E. Unless renegotiated by the parties upon notice given prior to sixty (60) days before the end of the initial term or the end of any subsequent year's term, ENDISPUTE shall receive compensation or reimbursement as

calculated under the Subsections "Monthly Maintenance", "Arbitrator and Case Management Fees", "Arbitrator Travel', Additional Charges" and "Rebate", above, but shall not be entitled to payment of any additional initial start-up fee.

XVI. COMPLIANCE WITH LAW

ENDISPUTE shall comply with all applicable federal, state and local laws, rules, regulations and reporting requirements.

XVII. GIFTS, GRATUITIES OR OTHER CONSIDERATION:

ENDISPUTE shall inform MCI immediately if an employee of MCI requests any form of payment, gift, loan, gratuity, or other consideration of any amount, to be paid or delivered by ENDISPUTE or on ENDISPUTE's behalf, to or for the benefit of the MCI employee. ENDISPUTE shall not provide any type of gift, loan, gratuity or other consideration, of any value, to any MCI employee without first informing the OGC in writing of such action.

XVIII. FORCE MAJEURE

Neither party to this Contract shall be held liable for any delay or failure in performance of any part of this contract from any cause beyond its control and without its fault or negligence, such as acts of God, acts of civil or military authority, government regulations, embargoes, epidemics, war, terrorist acts, riots, insurrections, fires, explosions, earthquakes, floods, power blackouts, or unusually severe weather conditions; provided however, that performance shall be excused only on a day-to-day basis to the extent of the actual prevention, restriction

or interference and provided that the party shall use its best efforts to remove or overcome the cause of the non-performance and restore performance as soon as possible or arrange for alternative performance if satisfactory to the other party.

XIX. CONSEQUENTIAL, INCIDENTAL AND SPECIAL DAMAGES

Neither party to this Contract shall be liable to the other for any indirect, special, incidental or consequential damages of any kind whatsoever related to or arising out of a party's performance of or failure to perform its obligation under this Contract, whether or not such damages were foreseeable.

XX. INDEMNIFICATION

Each party to this Contract will indemnify and hold harmless the other party from and against any loss, cost, claim, liability, damage or expense to third parties arising from or relating to the indemnifying party's failure to perform in accordance with the terms and conditions of this Contract, or the negligent acts or omissions, or willful misconduct of the indemnifying party, its employees, agents, or contractors in the performance of this Contract. For purposes of this paragraph, arbitrators shall not be considered agents, employees or contractors of either party. The party seeking indemnity shall promptly notify the indemnifying party in writing of any written claims, litigation or demands by third parties for which the party seeking indemnity alleges that the indemnifying party is responsible. The indemnifying party may elect by written notice within ten (10) days of the receipt of the notice to assume the defense of the claim,

demand or suit. The indemnified party shall cooperate fully in every reasonable manner with the defense or settlement of such claim, demand or lawsuit. The indemnifying party shall keep the indemnified party reasonably apprised of the status of the claim, demand or litigation. The indemnified party shall have the right to retain its own counsel, at its expense, and participate, but not direct the defense; provided however, that if there are reasonable defenses in addition to those which may be asserted on behalf of the indemnifying party which may be raised on behalf of the indemnified party, the indemnified party and its counsel may direct such defenses, which shall be at the expense of the indemnifying party. The indemnifying party shall have the right to approve any settlement or compromise of the claim, demand or litigation in advance, unless the claim has been tendered to the indemnifying party and that party has failed or refused to undertake promptly the defense or to indemnify the other party for such defense under this paragraph.

XXI. DISPUTE RESOLUTION

Either party to this Contract having a dispute relating to this Contract shall first notify the other party in writing of the nature of the dispute and support for its claim or dispute. Any disputes not resolved within sixty (60) days of the date of this notice, or a longer period by agreement of the parties, shall be submitted to arbitration. The cost of the arbitration shall be shared equally by the parties unless the arbitration award provides otherwise.

A. In the event of a referral to arbitration, each party shall appoint an arbitrator, who shall be an attorney who, to the knowledge of the appointing party, does not possess any conflicts of interest which might prejudice the proceeding. Objections to such appointments may be made only for reasons of a conflict of interest or other good cause. objections are waived unless the appointing party is notified of them in writing within ten (10) days of appointment. The arbitrators so selected will then select a third neutral attorney arbitrator within five days, who shall not be subject to disqualification by unilateral action of either party. If, after a hearing or mutual waiver of hearing, the three arbitrators are unable to reach a unanimous result within the allotted time, the third arbitrator will reach a decision alone.

B. Except as provided herein, the procedures, rules and standards of decision shall be those set forth in MCI's Arbitration Rules, including but not limited to the provision on kinds of relief which may not be granted.

XXII. TERMINATION

This Contract is terminable by either party to this Contract in the following circumstances and under the following conditions:

A. ***Termination at will:*** This Contract is terminable by either party at will effective sixty (60) days after the date of the written notice to the other party in accordance with this Contract ("Termination Date" for purposes of this Subsection). MCI shall continue to

refer matters to ENDISPUTE, and ENDISPUTE shall continue to receive matters under this Contract until the Termination Date.

B. *Termination in the event of insolvency:* This Contract is terminable effective sixty (60) days after the date of written notice to the other party in accordance with this Contract ("Termination Date" for purposes of this Subsection), in the event that the other party is adjudicated bankrupt under any federal, state or municipal bankruptcy or insolvency act, or the appointment of a receiver or any act or action constituting a general assignment by the other party of its assets and interest therein for the benefit of its creditors.

C. *Termination in the event of default:* This Contract may be terminated by either party for material breach thereof upon the giving of ten (10) days notice and concurrent opportunity to cure such breach, which notice shall state that termination is for breach and shall specify the obligations breached and state in detail the nature of the breach; provided that non-payment of any amount which has been disputed in writing under Section XV.D. shall not be considered a breach of this agreement which will support its termination under this Subsection except in the event of lack of timely payment of amounts duly awarded under Section XXII. Such termination shall be effective ten (10) days after the date of such written notice to the other party, in accordance with this Contract

("Termination Date" for purposes of this Subsection). MCI shall not be obligated to refer any further matters to ENDISPUTE following notice of a breach until such time as the breach is cured.

D. *Wind down period:*

1. In the event of termination, whether under this Section or by virtue of notice under Section III., ENDISPUTE shall be obligated to continue administration of ongoing arbitrations following the Termination Date, as such date may be calculated under the relevant provision, until the earlier of (1) the conclusion of each arbitration or (2) the transfer of administration to another administrator upon notice from MCI. An arbitration shall be considered ongoing if, on any Termination Date the ENDISPUTE has received a Notice of Claim under MCI's Arbitration Rules.

2. ENDISPUTE agrees to cooperate in the expeditious transfer of administration to any administrator designated by MCI following the Termination Date, including but not limited to providing an accounting of amounts paid to or owed each arbitrator assigned to an ongoing case and providing all records of the administration and the proceedings to the new administrator. In the event of transfer to another administrator, ENDISPUTE agrees to refrain from interfering with the continued performance of any arbitrator assigned to any on-going proceeding.

3. ENDISPUTE shall continue to provide MCI with weekly status reports under Section X. and access to the Electronic Docket and case scheduling and management system until all ongoing arbitrations have concluded pursuant to the MCI's Arbitration Rules or have been transferred to another administrator.

4. MCI shall continue to be obligated to pay the Monthly Maintenance Fee, prorated as follows:

   The Monthly Maintenance Fee shall be reduced in direct proportion to the ratio of:

   a. the average daily number of arbitrations remaining under administration by ENDISPUTE during the month for which the charges are being made,

      to

   b. the average number of arbitrations under administration during the three calendar months preceding the Termination Date (or the average of all preceding months if termination results in the first three months of the contract term)

   The average daily number of arbitrations shall be determined by taking the number of arbitrations pending on each business day of the month for which the charges are being made, totalling them, and then dividing this sum by the number of business days in

the month, rounding to the nearest whole number. The three-month average of arbitrations preceding the Termination Date shall be determined by taking the number of arbitrations ongoing at any time during each of the three months, totalling the months, and then dividing this sum by three. In no case shall the monthly recurring charges exceed one hundred percent (100%) of what the charge would be had termination not occurred.

5. In the event an arbitration is transferred prior to its conclusion, ENDISPUTE shall refund the arbitrator and case management fees to MCI as follows:

    a. if the arbitration is transferred before or on the day of the pre-hearing conference, then ENDISPUTE shall retain thirty percent (30%) of the filing fee.

    b. If the arbitration is transferred after the pre-hearing conference but prior to two (2) days before the scheduled hearing date, then ENDISPUTE shall retain forty percent (40%) of the filing fee.

    c. If the arbitration is transferred before an answer or counterclaim is filed by the responding party, then ENDISPUTE shall retain twenty percent (20%) of the filing fee.

6. If this Contract is terminated in its initial term, MCI shall be entitled to a refund of a pro-rated share of the initial start-up fee paid under Section XV.B.1. This pro-rated share is calculated by dividing the initial start-up fee by twelve (12) and then multiplying the result by the number of months (calculated from the 15th of each month to the following 14th day of the succeeding month) remaining in the initial term after the month in which the Termination Date falls.

XXIII. WAIVERS AND CONSENTS

No waiver of any provision of this Contract and no consent to any default under this Contract shall be effective unless signed by the party against whom such waiver or consent is claimed. No course of dealing or failure of any party to strictly enforce any term, condition, or right under this Contract shall be construed as a waiver of such term, condition or right. Waiver by either party of any default by the other shall not be deemed a waiver of any other default.

XXIV. REMEDIES CUMULATIVE

Unless otherwise provided for under this Contract, all rights of termination or cancellation, or other remedies set forth in this Contract are cumulative and are not intended to be exclusive of other remedies to which the injured party may be entitled by law or equity in case of any breach or threatened breach by the other party of any provision of this Contract. Use of one or more remedies shall not bar use of any other remedy for the purpose of enforcing any provision of this Contract.

XXVI. SURVIVAL OF OBLIGATIONS

The obligations of Section II. (Independent Contractors) and Sections XVIII. (Force Majeure) through XXXIV. (Amendment) shall survive the termination of this Contract.

XXV. CONFIDENTIALITY

ENDISPUTE shall not disclose the arbitration proceedings except as provided for in this Contract and except as required in a judicial proceeding to challenge or enforce an award, or except as otherwise required by law. ENDISPUTE shall also hold in confidence the contents of any report(s) generated by it in the course of performance of this Contract, except as disclosure is required by law or as expressly consented to by MCI in writing.

Furthermore, ENDISPUTE shall not disclose any MCI proprietary or confidential information, including but not limited to any information about MCI systems it may obtain in the course of developing and maintaining the online systems, without the prior written consent of MCI or except as required by law. ENDISPUTE shall notify MCI as soon as possible, and in all cases prior to disclosure, of any disclosure to be made pursuant to law in order to permit MCI the opportunity to respond prior to the disclosure. With the exception of systems information, and with the exception of proprietary or confidential information which is disclosed in the course of an arbitration proceeding, MCI shall label or otherwise identify all such proprietary or confidential information relayed to ENDISPUTE.

XXVI. ASSIGNMENT

This Contract may not be assigned by either party without the prior written consent of the other, which shall not be unreasonably withheld. All obligations and duties of any party under this Contract shall be binding upon all successors in interest and assigns of such party. Any assignment in violation of this Section shall be void.

XXVII. NO THIRD PARTY BENEFICIARIES

The provisions of this Contract are for the benefit of the parties and not for any other person. However, should any third party institute proceedings, this Contract shall not provide any such person with any remedy, claim, liability, reimbursement, cause of action or any other right in excess of those provided in this Contract.

XXVIII. GOVERNING LAW

Except as otherwise provided in this Contract, the interpretation and performance of this Contract shall be governed by the laws of the District of Columbia, without reference to that jurisdiction's law on choice of law.

XXIX. HEADINGS

The headings and numbering of sections and paragraphs in this Contract are for convenience only and shall not be construed to define or limit any of the terms or affect the meaning or interpretation of this Contract.

XXX. SEVERABILITY

In the event that any one or more of the provisions of this Contract shall be held unenforceable in any respect under law, such unenforceability shall not affect any other provision of this Contract, but this Contract shall be construed as if such unenforceable provision or provisions had never been contained herein.

XXXI. ENTIRE AGREEMENT

This Contract, including exhibits and attachments as referenced and incorporated herein, constitutes the entire agreement between the parties and supersedes all prior or contemporaneous agreements, representations, statements, negotiations, understandings, proposals and undertakings, whether oral or written, with respect to the services provided.

XXXII. NOTICE

With the exception of any notices given to parties to specific arbitrations, any notice provided for in this Contract shall be given to the recipient party by certified mail postage prepaid and return receipt requested, or sent via fax with report of successful transmission, or MCI Mail with electronic confirmation, or delivered by receipted courier or overnight service, or by personal delivery with receipt, to that party. Any notice which is required by this Contract to be in writing shall be considered to have been given in writing if sent by MCI Mail with confirmation of receipt. Notices are to be given at the parties' following respective addresses:

MCI Communications
Corporation
1133 19th Street, N.W.
Washington, DC 20036
Attention: Arbitration
Coordinator
Dept. 0597/003

FAX: (202) 736-6482

MCI Mail Address: As
Provided By MCI Mail

ENDISPUTE, Inc.:
1201 Connecticut Ave., N.W.
Washington, D.C. 20036
Attention: MCI Contract
Administrator

FAX: (202) 728-2920

MCI Mail Address: As
Provided by MCI Mail.

Such designated addresses, fax numbers and MCI Mail Addresses may be changed from time to time unilaterally by written notification to the other party, effective no sooner than five (5) business days after the date of the notice unless the parties agree to a shorter period.

XXXIII. AMENDMENT

Excluding any publicly-filed modifications to MCI's Arbitration Rules, of which MCI will provide ENDISPUTE notice, this Contract may be amended only in writing signed by duly authorized representatives of both parties.

SIGNED BY THE DULY AUTHORIZED REPRESENTATIVES IN DUPLICATE ORIGINALS:

ENDISPUTE, INC.

By: /s/ Illegible

Title: President

Date: 6/23/94

MCI COMMUNICATIONS CORPORATION

By: /s/ Illegible

Title: Sr. V.P. & General Counsel

Date: 6/27/94

MCI TELECOMMUNICATIONS
CORPORATION

TARIFF F.C.C. NO. 1
16TH REVISED PAGE NO. 10
CANCELS 15TH REVISED PAGE NO. 10

CUSTOMIZED BUSINESS
COMMUNICATIONS SERVICE

SECTION B – RULES AND REGULATIONS

* * *

4. LIABILITY

.01 Except for granting credit allowances for interruptions of service as provided for in Section B-15 and other sections of this tariff, MCI shall not be liable for any failure of performance due to causes beyond its control, including, but not limited to, acts of God, fires, floods or other catastrophes; national emergencies, insurrections, riots or wars, strikes, lockouts, work stoppages or other labor difficulties; preemption of existing services to restore service in compliance with Part 64, Subpart D, Appendix A, of the FCC's Rules and Regulations; and any law, order, regulation or other action of any governing authority or agency thereof,

.02 MCI's liability for willful misconduct, if established as a result of judicial or administrative proceedings, is not limited by this tariff. MCI's liability, if any, with regard to the delayed installation of MCI facilities or commencement of service, shall not exceed $1,000. With respect to any other claim or suit, by a customer or by any others, for damages associated with the ordering (including the reservation of any specific number for use with a service), installation

(including delays thereof), provision, termination, maintenance, repair, interruption, or restoration of any service or facilities offered under this tariff, and subject to the provisions of Sections B-4.03 to B-4.08 following, MCI's liability, if any, shall be limited as follows:

.021 With respect to any Dedicated Leased Line Service offered by MCI in Section C-2 herein, MCI's liability shall not exceed an amount equivalent to the credit for interruption of service provided for in the relevant subsections of Section C-2.02.02 of this tariff (principally Section C-2.02116). With respect to other services offered by MCI which have the characteristics of a private line service, MCI's liability shall not exceed an amount equal to the proportionate monthly recurring charge or charges for the service for the period during which the service was affected.

.022 With respect to any service provided by MCI which involves dedicated access, shared interexchange transmission and shared termination. MCI's liability shall not exceed an amount equal to the proportionate monthly recurring charges – including any service charges, minimum monthly charges, basic feature package charges, monthly charges for optional feature, charges for dedicated access facilities and any other monthly charges – for the period during which the service was affected, or, if only a transmission using the shared interexchange facilities is interrupted, an amount equal to the charge applicable to a one minute call to the

called station at the time the affected call was made.

.023 With respect to any inbound service provided by MCI which involves shared access and shared interexchange transmission, and/or shared termination, including Personal 800 Service. MCI's liability shall not exceed an amount equal to the proportionate monthly recurring charges – including any monthly fee for any option associated with the service, charges for dedicated termination facilities, and any other monthly charges – for the period during which the service was affected, or, if only a transmission using the shared interexchange facilities is interrupted, an amount equal to the charge applicable to a one minute call to the customer's station at the time, and over the range, of the affected call, taking account of the form of service and type of termination the customer had selected.

Where any claim arises out of MCI's acting as a Resp Org. or performing SMS Resp Org Changes, or where any claim arises out of any and all failings by MCI in connection with the provision of 800 Service to the customer (other than Personal 800 Service), including where MCI 800 Service, excluding the Personal 800 Feature, is not made available on the date committed to the customer, or cannot otherwise be made available after MCI's acceptance of the customer's order, or is provided with a number or numbers other than the one(s) committed by MCI to the customer, or the

number or numbers are not included in 800 Service Directory Assistance or are included in an incorrect form, and any such failure or failures is due solely to the negligence of MCI, in such case MCI's liability, if any, will be limited to the lesser of (a) the actual monetary damages incurred and proved by the customer as the direct result of such failure or failures, or (b) the sum of $1,000.00. With respect to Resp Org Service and SMS Resp Org Changes, the customer will indemnify and hold MCI harmless against any third party claims arising out of the execution of changes requested by the customer, including those changes made by an 800 Subscriber. Where the Resp Org Service customer is a customer acting on behalf of an 800 Subscriber, the customer represents that is has the authority to act on the 800 Subscriber's behalf in choosing a Resp Org and otherwise utilizing MCI's Resp Org Service.

MCI shall not be liable at all for the use, misuse, or abuse of a customer's 800 Service by third parties, including, without limitation, the customer's employees or members of the public who dial the customer's 800 number by mistake. Compensation for any injury the customer may suffer due to the fault of others than MCI must be sought from such other parties. In the event that MCI causes the misrouting of calls under the CCID feature, MCI's sole liability shall be to provide a credit equal to the charges for the affected calls.

.024 With respect to any service provided by MCI which involves shared access, shared interexhange transmission, and shared termination, MCI's liability shall not exceed an amount equal to the charge applicable to a one minute call to the called station at the time the affected call was made.

This limitation applies to all international calls regardless of the MCI service to which the customer subscribes.

.025 With respect to any service provided by MCI which involves dedicated access, shared interexchange transmission, and dedicated termination. MCI's liability shall not exceed an amount equal to the charge applicable to a one minute call to the called station at the time the affected call was made.

.026 With respect to any service provided by MCI which involves a switching service interconnecting network trunks [CCSA Service], MCI's liability shall not exceed an amount equal to the proportionate monthly recurring charges – including basic charges, charges for options, and any other monthly charges – for the period during which the service was affected.

.027 With respect to the routing of calls by MCI to public safety answering points or municipal emergency service providers, MCI's liability, if any, will be limited to the lesser of: (a) the actual monetary damages incurred and proved by the customer as the direct result of MCI's action, or failure

to act, in routing the call, or (b) the sum of $1,000.00.

.028 With respect to MCI's offering of Telecommunications Relay Service (TRS), any service provided by MCI which involves receiving, translating, transmitting, or delivering messages by telephone, text telephone, a Telecommunications Device for the Deaf, or any other instrument over the facilities of MCI or any connecting carriers or through any TRS centers operated by MCI or its agents, MCI's liability shall not exceed an amount equal to MCI's charge for a one minute call to the called station at the time the affected call was made.

The liability provided for above, shall, in each case, be in addition to any amounts that may otherwise be due the customer under this tariff as a credit allowance for the interruption of service.

* * *

MCI TELECOMMUNICATIONS CORPORATION

TARIFF F.C.C. NO. 1
7TH REVISED PAGE NO. 12.3.4
CANCELS 6TH REVISED PAGE NO. 12.3.4

CUSTOMIZED BUSINESS COMMUNICATIONS SERVICE

SECTION B – RULES AND REGULATIONS

7. PAYMENT ARRANGEMENTS [Continued]

* * *

.13 Arbitration of disputes: All disputes concerning or affecting payment of invoices issued after February 28, 1994 for charges totaling $10,000.00 and above may be resolved through binding arbitration. A dispute concerns or affects payment of invoices when the customer fails to pay an invoice or contests it for any reason associated with the ordering, installation, provisioning, maintenance, repair, interruption, restoration or termination of any service or facility offered under this Tariff. Once MCI or the customer has commenced arbitration of a dispute, arbitration shall be mandatory, and counterclaims may be asserted. The arbitration shall be administered by the neutral third party administrator [Administrator] identified in Section B-7.13232, and shall be conducted under the arbitration rules and procedures set forth in Sections B-7.131 through B-7.139 (Rules). As a condition of service under this Tariff, claims and counterclaims arbitrated under these Rules shall be governed by the law and remedies provided by these Rules.

.132 Commencement of Arbitration [Continued]

.1327 Answer: Within 17 days after the date of commencement of the arbitration, the Responding Party shall serve a written Answer on the Claiming Party and the Administrator. The Answer shall make any

necessary corrections to the identification of the Responding Party in the Notice of Claim, shall identify the Responding Party's representative, and shall briefly state the Responding Party's defenses to the claim and the reasons therefor.

.13271 Failure to Respond: An award will be entered, without a hearing, against a Responding Party who fails to serve an Answer to a Notice of Claim within 17 days after the date of commencement of the arbitration, unless the arbitrator finds that the party's failure to respond was excusable.

.13272 Notice of Counterclaim: If the Responding Party has a counterclaim, a written Notice of Counterclaim shall be served together with the Answer. The Notice shall state the grounds for the counterclaim, the invoices affected, the amount in dispute, and the relief sought. A Notice of Counterclaim by MCI shall comply with Section B-7.13251. The fee required by Section B-7.1321 shall accompany the copies served on the Administrator. The counterclaim may be precluded from the arbitration if the fee is not timely paid.

.13273 Reply to Counterclaim: The Claiming Party may serve a Reply to the Notice of Counterclaim within 28 days after the date of commencement of the arbitration. The Reply shall

briefly state the defenses to the counterclaim. Failure to serve a Reply shall be deemed a denial of the counterclaim.

.1328 Amendments: A party seeking to amend its Claim, Answer, Counterclaim, or Reply shall serve on the other party and the Administrator a request to the arbitrator for leave to amend. The arbitrator shall grant leave to amend only upon agreement of all parties, except that when: 1) a Claiming Party seeks to change the name of the Responding Party, either by correction or addition; or 2) a party seeks to correct a computational, clerical or typographical error, the arbitrator in his/her own discretion may grant leave to amend. An amendment, if allowed, shall be served in the same manner as the original pleading. No amendments, other than an amendment to the name of the responding party, shall be allowed subsequent to the pre-hearing conference.

.1329 Withdrawal from Arbitration: No party may terminate or withdraw from an arbitration after it commences except by written agreement of all parties to the arbitration; however, the Claiming Party may terminate arbitration of its Claim, and the Responding Party may terminate arbitration of its Counterclaim, by serving written notice on the Administrator and the other party.

.133 Administrative Conference: Within 9 days after the date of commencement of the arbitration, the Case Manager shall conduct an

administrative conference with the parties to discuss the management of the arbitration, including the location and scheduling of the hearing. The Case Manager may convene additional administrative conferences as needed. These conferences may be conducted in person or by telephone at the Case Manager's discretion.

.1331 Scheduling and Location of Hearing: Within 3 days after the administrative conference, the Case Manager shall serve on the parties a Notice of Hearing, setting the location, date, and time of the hearing. Absent unusual circumstances, the hearing will be scheduled within 60 days after the date of commencement of the arbitration. Disputes about the location and scheduling of the hearing shall be resolved by the Case Manager.

.1332 Settlement and Consent Award: At any time prior to the rendering of the award, the parties themselves may settle their dispute. When the parties reach a settlement, they shall immediately notify the Case Manager in writing. At the request of all parties, the arbitrator shall set forth the terms of the settlement in an award known as a consent award. A consent award shall be signed and dated by the arbitrator, and shall be considered an award rendered by the arbitrator. The arbitration will be deemed terminated either upon the Administrator's receipt of the notice of settlement, or upon the date of issuance of the consent award pursuant to Section B-7.1382, whichever date is later.

.134 Arbitrator Selection: Within 10 days after the date of commencement of the arbitration, the Administrator shall serve on the parties a Notice of Appointment of Arbitrator, identifying the arbitrator selected to conduct the arbitration. The administrator shall select a single neutral arbitrator from a pool of experienced commercial arbitrators, prescreened by the Administrator for potential conflicts of interest. If for any reason the arbitrator selected refuses or is unable to fulfill an arbitrator's duties, the Administrator shall select a successor arbitrator.

.1341 Objections to Arbitrator: The arbitrator appointed by the Administrator may be removed only for bias or other good cause. Objections by the parties to the appointment of the arbitrator are waived unless served on the Administrator within 23 days after the date of commencement of the arbitration. The Administrator shall resolve the objections, and if necessary, promptly appoint a new arbitrator.

.1342 Oath of Office: The arbitrator will execute an oath of office at the time of his/her appointment, and will agree to abide by the Code of Ethics for Arbitrators in Commercial Disputes.

.1343 *Ex Parte* Communications: No party shall have an *ex parte* communication with the arbitrator regarding any issue related to the arbitration. All necessary pre-hearing communication with the arbitrator shall be initiated through the Case Manager in accordance with these Rules.

.135 Exchange of Information: Within 23 days after the date of commencement of the arbitration, each party shall serve on the other party: (1) copies of all documents and tangible things in its possession, custody or control upon which it relies to support its position; and (2) information concerning the identity of experts who may be called to testify or whose reports may be introduced at the hearing, and the identity of persons with knowledge of the claims, counterclaims, and defenses asserted.

.1351 Continuing obligation: Each party, as it becomes aware of documents and information supporting its position not previously disclosed, remains under a continuing obligation to provide such supplemental information to the other party. The parties and the arbitrator shall make every effort to complete the exchange of information no later than 15 days prior to the date of the hearing.

.1352 Protective orders: Upon the request of any party, the arbitrator shall issue orders to protect the confidentiality of proprietary information, trade secrets or other confidential information of the parties, or in the possession or control of the parties.

.1353 Invoices, Call Detail: MCI shall not be required to produce the invoices or call detail provided to the customer in the normal course of business, unless the arbitrator determines that the customer has shown good cause for the production of such records.

.1354 Failure to Exchange: At the hearing, or if the hearing has been waived, on the

written submissions, the arbitrator shall not consider information, documents or things required to be exchanged by Section B-7.135 which the parties have not previously exchanged, unless the parties otherwise agree. If a party fails to cooperate in the exchange of information, the arbitrator may sanction the disobedient party by determining certain facts against it, or by refusing to allow it to support or oppose certain claims, defenses or counterclaims.

.136 Pre-Hearing Conference: The arbitrator may require a pre-hearing conference to narrow the focus of the hearing by stipulations of fact and joint statements of issues, and to resolve other issues related to the conduct of the hearing. Any party may request a pre-hearing conference by serving the Administrator and the other party with such a request. Upon any party's request, the arbitrator shall conduct a pre-hearing conference. Absent unusual circumstances, the pre-hearing conference shall be scheduled no earlier than 20 days prior to the date of the hearing, and no later than 10 days prior. The conference may be conducted by telephone or in person, at the arbitrator's discretion. The Case Manager shall schedule and notify the parties of the date, time, and location of the pre-hearing conference.

.1361 Pre-Hearing Submissions: The arbitrator may require the parties to submit, prior to the hearing, witness and exhibit lists, and concise written statements of their positions not to exceed 10 pages in length. When not required, a party may

elect to submit such materials. These submissions shall be served on the Administrator and the parties, and must be received by the Administrator and the parties at least 8 days prior to the hearing. The arbitrator may require or permit rebuttal statements.

137 Waiver of Hearing: The parties may agree to waive the hearing and to submit the dispute to the arbitrator on written submissions and other evidence upon which the parties agree.

.1371 Securing of Evidence for Hearing: A party seeking the attendance of witnesses or the production of documents at the hearing may serve on the other party and the Administrator a request for the issuance of subpoenas by the arbitrator. If there are no objections, the arbitrator shall issue the subpoenas requested in accordance with 9 U.S.C. § 7. If a party objects to the subpoenas requested, the party may serve an objection on the Administrator and the other party. The arbitrator shall rule on the objections prior to the hearing, weighing both the burden on the producing party and the need of the proponent for the evidence.

.1372 Party Absence: A party may elect to submit its case to the arbitrator on written submission and other evidence, and decline to appear at the hearing. When one party fails or declines to appear at the hearing, but the other party is present, the arbitrator shall proceed with the hearing and require the party present to introduce

its evidence, and make the arguments in support of its claims and/or defenses.

.1373 Hearing Procedures: The hearing may be conducted in person, by telephone, or by video conference, at the arbitrator's discretion. The arbitrator shall determine the order of presentation of the evidence, which will generally follow the order of a court trial, including opening and closing statements. The arbitrator shall require witnesses to testify under oath.

.1374 Evidence: The arbitrator shall consider evidence that she/he finds relevant and material to the dispute, and shall give the evidence such weight as she/he determines appropriate. The arbitrator is not required to but may use the Federal Rules of Evidence and the Federal Rules of Civil Procedure to make evidentiary determinations.

.13741 Privileges: The common law principles developed by the federal courts shall govern all claims of privilege. Federal Rule of Civil Procedure 26(b) shall govern work product claims

.13742 Recorded testimony: The arbitrator may consider witness affidavits or other recorded testimony, but will give that evidence only such weight as the arbitrator deems appropriate.

.13743 Settlement negotiations: No party shall introduce, and the arbitrator shall not consider, prior settlement offers by the parties, or statements or

recommendations made by a mediator or other person in connection with efforts to resolve the dispute being arbitrated

.1375 Record: No stenographic record will be made of the hearing unless agreed by the parties

.1376 Closing of Hearing: When the arbitrator determines that the parties have presented their arguments and all relevant and material evidence, the arbitrator shall declare the hearing closed. Post-hearing briefs shall not be allowed. The Administrator shall resolve disputes concerning the closing of a hearing.

.138 Timing of the Award: The arbitrator shall render the award within 14 days after the date of the first day of the hearing. When the parties waive the hearing, the arbitrator shall render the award within 10 days after the date of her/his receiving the parties' submissions and evidence.

.1381 Standard for Award: The award shall be based upon the record before the arbitrator. The award shall be in writing, signed and dated by the arbitrator. As to each claim, the award shall state which party prevailed and the amount awarded or other relief granted, and shall direct payment of any amount due the prevailing party.

.13811 Applicable law: In making the award, the arbitrator shall be guided by: (1) the principles of federal arbitration law stated in the United States Arbitration Act, 9 U.S.C. §§ 1-16, and

the decisions of federal and state courts thereunder; and (2) the principles of federal telecommunications law stated in (a) the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-609, (b) the decisions of federal and state courts thereunder, (c) the decisions, orders, rules and regulations of the Federal Communications Commission, and (d) applicable MCI tariffs filed and maintained with the FCC. The arbitrator must apply the relevant terms of any applicable publicly filed tariff. The arbitrator has no authority under any circumstances to deviate from or abrogate the terms of any applicable publicly filed tariff.

.13812 Relief: The arbitrator is empowered to award remedies allowed by law and to grant final and complete relief. Notwithstanding this authority, the arbitrator may not award any interlocutory relief, including temporary or preliminary injunctions, nor may the arbitrator award punitive damages, treble damages, or penalties other than these provided in any applicable publicly filed tariff, nor may the arbitrator assess attorneys' fees.

.13813 Assessment of Fees: In the award, the arbitrator may assess all fees paid to the Administrator for the arbitration plus the arbitrator's travel costs against MCI if the arbitrator determines that the customer had a

reasonable basis in fact for disputing MCI's Statement of Account. If the arbitrator determines that the customer had no reasonable basis in fact for disputing MCI's Statement of Account, the arbitrator may assess or allocate fees paid to the Administrator for the arbitration and the arbitrator's travel costs against the customer.

.1382 Issuance: Within 3 days of receiving the arbitrator's award, the Administrator shall issue the award by serving copies on the parties. The date of issuance of the award will be the date the Administrator serves it.

.13821 Correction: Within 7 days after the date of issuance of the award, any party may serve on the Administrator and the other party a request that the arbitrator correct any computational, clerical, typographical or similar error in an award, or the arbitrator may correct such errors in the award on his/her own initiative. The arbitrator shall make any necessary and appropriate corrections to the award within 7 days of receiving a request. The Administrator shall issue the corrected award pursuant to Section B-7.1382. No substantive reconsideration shall be allowed. The administrator shall not forward motions or request for reconsideration to the arbitrator, and in no event shall the arbitrator rule on such requests.

.1383 Final and Binding: Seven days after the date of issuance of an award as to which no correction is requested or made, the award shall be final and binding on the parties. If the award is corrected pursuant to Section B-7.13821, the corrected award shall be final and binding on the parties 7 days after the date of its issuance.

.1384 Compliance: Unless the arbitrator orders otherwise, within 30 days after the date of issuance of the award if there is no corrected award, or within 30 days after the date of issuance of the corrected award, the party against whom an award is rendered shall pay the amount awarded and otherwise comply with the award. If a party fails to pay within the 30 days, or the time period ordered by the arbitrator, interest may accrue on the amount due at 12 percent per annum or 1 percent per month, beginning on the date of issuance.

.1385 Enforcement of the Award: Judgment may be entered upon an award in federal or state court. The United States Arbitration Act, sections 9 through 13, 9 U.S.C. §§ 9-13, shall govern all proceedings to confirm, modify, or vacate an award. When a party seeks to confirm an award and prevails, the non-prevailing party shall pay all reasonable costs, including attorneys' fees and expenses, incurred by the prevailing party in connection with the confirmation proceeding.

.139 Confidentiality: The parties, the Case Manager, and the arbitrator shall treat the arbitration, including any conferences, the exchange of

information, the hearing and the award, as confidential, and shall not disclose the proceedings except as required in a judicial proceeding to challenge or enforce an award, or unless otherwise required by law.

.1391 Privacy: The arbitrator, the Case Manager, and the parties shall maintain the privacy of all arbitration conferences and hearings. Subject to the discretion of the arbitrator and agreement of the parties, any person having a direct interest in the arbitration may attend the conferences and the hearing. The arbitrator may exclude any person or non-party witness from any part of a hearing.

.1392 Sanctions: The arbitrator may impose appropriate sanctions on a party who fails to comply with these Rules. Sanctions may include assessment of fees, prohibiting the introduction of certain evidence, or ruling on an issue submitted to arbitration adversely to the party who has failed to comply.

.1393 Interpretation of Rules: Once appointed, the arbitrator shall resolve disputes about the interpretation and application of these Rules, including disputes relating to the arbitrator's duties and the conduct of the hearing. Disputes over the interpretation and scope of Section B-7.13, including disputes over the jurisdiction of the arbitrator, shall be submitted to and ruled on by the arbitrator. In making these determinations, the arbitrator shall be guided by the principles of federal arbitration law, the United States Arbitration Act,

9 U.S.C. §§ 1-16, the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-609, and related principles of federal telecommunications law. Disputes arising before the appointment of the arbitrator shall be resolved by the Case Manager.

.1394 Conflict With Law: If the arbitration of any claim under these Rules conflicts with any applicable statute that provides for the exclusive jurisdiction of such claim in some other forum, the statute shall control.

ARBITRATION OF CUSTOMER DISPUTES: THE MCI APPROACH

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MCI Telecommunications Corporation
1133 19th Street, N.W.
Washington, D.C. 20036

ARBITRATION OF CUSTOMER DISPUTES: THE MCI APPROACH

I. Description of MCI

A. Overview

1. MCI provides voice and data telecommunications services to millions of users all over the globe. Sales and service within the United States is provided by employees located in branch sales offices in each of the fifty states. MCI does not manufacture or sell equipment.

2. Most services are offered to the public pursuant to the terms and conditions contained in MCI F.C.C. Tariff No. 1 which is on file with the Federal Communications Commission ("FCC") and the state utility regulatory agencies. The Communications Act of 1934, as amended, 47 U.S.C.A. § 151 *et seq.* (1991 & Supp. 1995) requires that all common carriers file and maintain tariffs with the FCC reflecting their rates, terms and conditions for interstate service.

3. The Tariff permits MCI to make unilateral changes in the terms and conditions of service. This enabled MCI to implement its arbitration program through a Tariff

amendment, and to have a uniform commencement date for all affected customers.

B. Role of the Office of the General Counsel in Handling Consumer Disputes

1. The MCI arbitration program was designed to be administered by either the office of the General Counsel or lay personnel inside or outside the company. MCI saw no clear advantage to either model.

2. Under the current system, the program is run by the in-house legal staff consisting of litigation attorneys, paralegals and administrative support personnel. With the exception of one attorney in Texas, all of the attorneys responsible for the arbitration project are located in Washington, D.C., the company's headquarters.

3. Paralegals and staff personnel prepare the case for filing, draft the notice of claim, and secure the gathering of evidence in support of MCI's position in the subject dispute. MCI's in-house attorneys conduct all negotiations and attend all hearings.

II. Reasons MCI Created Program for binding arbitration of Certain Consumer Disputes

A. Speed

B. Cost Efficiency

C. Privacy

D. Consistency in rules applicable to similar disputes

E. Finality of decision reached by the arbitrator

III. Practical Considerations of Setting up an Arbitration Program

A. Drafting the Rules

1. The threshold decision that must be made in establishing a large scale arbitration project is whether you will use the rules and procedures adopted by an arbitration service provider such as the American Arbitration Association or J*A*M*S/Endispute, or whether you will draft your own. MCI elected to create its own rules and procedures. it also drafted a plain English customer guide to the arbitration process and rules which is sent to the customer with the notice of claim.

2. The major issues MCI addressed in constructing its arbitration dispute resolution process are:

a. Scope of arbitrable disputes

(1) MCI limited the scope of arbitration to disputes that "concern or affect the payment of invoices"

(2) The customers' right to bring statutory or federal causes of action are expressly preserved

b. Availability and extent of "discovery" or us [sic] of alternative information exchange models

(1) A major element of the delay in court proceedings is needless and misdirected discovery by each side – do not duplicate that model unless you want the same result.

(2) Voluntary or mandatory information exchange – each party should have the ability to compel the production of *relevant* information.

c. Time and speed of the proceedings

(1) The major problem for consumers and industry alike is the enormous delay now experienced in most court systems – to avoid a backlog you must be willing to commit to an aggressive schedule and adhere to it. MCI's schedule requires the first day of hearing no later than 61 days from the date of the notice of claim.

(2) At MCI the attorneys are not given the ability to move a date once it is set without the agreement of the other side and the case administrator.

d. Exclusivity and counterclaims

(1) MCI's program favors, but does not mandate, the use of arbitration. Either the customer or the company may file in court. But once arbitration is commenced, it becomes mandatory for the dispute concerning or affecting the payment of invoices.

(2) Counterclaims are permitted but are not mandatory. A counterclaim may be instituted in court despite the ongoing arbitration. However, if a party submits a claim to arbitration it does so under the rules

and thereby consents to the exclusion of punitive damages and injunctive relief.

e. Selection of Case Administrator

(1) In order to control the administrative costs, MCI requested proposals from the major arbitration services and then negotiated the contract for case administration.

(2) Only major service providers were considered to avoid MCI being a dominant amount of the providers business.

(3) MCI required:

(a) Electronic docket access

(b) Dedicated staff

(c) Flat rate fee structure rather than hourly – no "study days"

(d) Partial rebates of the filing fees for cases that do not proceed to hearing including settlements more than a designated time before the hearing date.

(4) Specify in the contract the degree of support you expect of the case administrator. It is not sufficient for the administrator to merely provide a hearing room and a list of arbitrators.

f. Location of hearings

(1) MCI goes to the customer. All hearings are set in the locality where the customer is located.

(2) Use of telephone and video conference hearings are permitted. Either side may present an individual witness by this means.

B. Staffing

1. MCI uses a combination of full and part-time employees in order to maintain as much flexibility as possible and to keep a control on the costs.

2. Consider whether you will be able to bid cases out to law firms. MCI has started to do this and has had a very favorable early reception to the concept from outside firms. Consider having large law firms use these cases for training their less experienced attorneys. Counterclaims can pulled back.

IV. Not all Disputes between MCI and Consumers are subject to Binding Arbitration

A. The role of the tariff in determining the disputes required to be resolved by binding arbitration

1. The tariff is a public document on file with the Federal Communications Commission

2. It sets rates, terms and conditions for the telecommunications services to be provided

3. It provides for binding arbitration of disputes "concerning or affecting" the payment of invoices totaling $10,000 or more

for services rendered after February 28, 1994, including:

a. Ordering service

b. Service installation

c. Provisioning

d. Maintenance

e. Repair

f. Interruption

g. Restoration

h. Termination of service

4. Claims and counterclaims involved in disputes subject to binding arbitration can be asserted in the same arbitration, and are subject to the same law and remedies set forth in the Rules of Arbitration

B. Disputes not required by the tariff to be resolved by binding arbitration

1. Disputes totaling less than $10,000

2. Disputes concerning issues other than the amount of the invoice, such as the timely commencement of service or types of services provided

V. Role of Attorneys in Binding Arbitration

A. The arbitration procedure was designed so that neither MCI nor the consumer are required to be represented by an attorney, although either side can choose to be represented by counsel

B. Attorneys' fees paid for representation in the arbitration will not be recovered by either MCI or the consumer represented by counsel

VI. Commencing an Arbitration: Filing a Notice of Claim

A. Either side can commence the arbitration by filing a written Notice of Claim on the other party and two copies on the arbitration administrator

1. The party filing the Notice of Claim is the Claiming Party

2. The party answering the Notice of Claim is the Responding Party

B. Once commenced, arbitration is mandatory

C. Content of the Notice of Claim

1. Identification of the disputed invoices

2. Specification of the amount in dispute

3. Customer's account number

4. Definition of the claim to be decided in the arbitration

5. Relief sought

6. When commenced by MCI:

a. A Statement of Account must be included, specifying the disputed billing period, invoices and amounts at issue

b. A copy of the Rules of Arbitration must be included

VII. Arbitration Fees

A. The party commencing the arbitration must pay the required commencement fee, which is based on a formula according the amount of

the dispute, ranging from $1,500 for disputes on amounts between $10,000-$30,000 and going up to $4,000 + .005 of the amount claimed for disputes on amounts of $100,001 and over

B. When the Responding Party serves a Notice of Counterclaim on the Administrator, that party must pay a fee ranging from $250 for counterclaims on amounts between $0-$5,000 and going up to $4,000 + .005 of the amount claimed for disputes on amounts of $100,001 and over

C. The Administrator may charge additional fees for hearing lasting longer than two days, and such costs shall be shared equally by the parties

D. The party requesting a postponement or other action must pay additional fees set by the Administrator

VIII. Representation by Counsel

A. Either party may represent itself or be represented by counsel in an arbitration

B. The name, address, telephone and facsimile numbers of a party's representative must be stated in all papers served on the other party and the Administrator

IX. Service

A. One copy of papers required to be served must be served on the other party to the arbitration, and two copies must be served on the Administrator

B. A signed statement confirming the date, method of service and address where the

papers are being served must accompany all papers served

C. Service is complete upon placing papers served in the mail, with a courier or upon transmittal by facsimile

D. Service of the Notice of Claim, Answer, Notice of Counterclaim, Notice of Hearing and the Award shall be made by means that provide proof of delivery, such as:

1. Overnight or other courier service

2. Certified or registered mail with a return receipt

3. Hand delivery

E. Service of all other papers can be made by first class mail, facsimile, hand delivery or overnight or other courier service

F. Service shall be addressed as follows:

1. For a customer, at the customer's billing or business address, or at another address specified by the customer

2. For MCI, at the Office of the General Counsel, to the attention of the Arbitration Coordinator

3. For the Administrator, at the address of the Administrator

X. Time

A. The date of commencement is the date the Administrator receives the Notice of Claim and the fee

B. All time periods are calculated based on calendar days

C. The Administrator has discretion to extend or modify the time limits when necessary to facilitate the arbitration

D. Specific time periods are set forth in the Rules of Arbitration for the appointment of the Case Manager, serving an Answer to a Notice of Claim, serving a Counterclaim to a Notice of Claim and serving a Reply to the Notice of Counterclaim

XI. Amendments

A. A request for leave to amend the Claim, Answer, Counterclaim or Reply shall be served on the other party and the Administrator

B. The Administrator shall grant leave to amend only upon the agreement of all parties, except the Administrator may use his/her discretion to grant leave to amend to correct computational, clerical or typographical errors

C. Amendments must be served in the same manner as the original papers

XII. Administrative Conferences

A. An administrative conference will be scheduled by the Case Manager within nine days after the date of commencement of the arbitration covering issues such as:

1. Location of the hearing

2. Scheduling of the hearing

B. Additional administrative conferences may be called by the Case Manager, as needed

C. Administrative conferences may be conducted *in person or by telephone*

XIII. Withdrawal, Settlement and Consent Awards

A. No party may withdraw from or terminate a pending arbitration except by written agreement of all parties to the arbitration

B. The parties themselves may settle their dispute any time prior to the arbitration award being awarded

1. The settlement reached by the parties shall be reduced to a writing, called a consent award

2. A consent award shall be treated considered an award by the Arbitrator

XIV. Arbitrator Selection

A. The Administrator shall serve a Notice of Appointment of Arbitrator on the parties

B. One experienced commercial Arbitrator shall be appointed

C. The Administrator will prescreen the Arbitrator for potential conflicts of interest.

D. A party can object to the Arbitrator selected only for:
1. Bias
2. Other good cause

E. A party's failure to object to the Arbitrator appointed shall be waived unless filed with the Administrator within 23 days after the commencement of the arbitration

F. The parties shall not have any ex parte communication with the Arbitrator regarding any issue related to the arbitration, and all

pre-hearing communication shall be initiated through the Case Manager

XV. Exchange of Information

A. Documents, Experts and other Tangible Evidence

1. Within 23 days after the commencement of the arbitration, each party shall serve on the other party the following information:

2. Copies of all documents and tangible things in its possession, custody or control upon which it relies to support its position

3. Information concerning the identity of experts whose testimony or reports may be introduced at the hearing

4. The identity of persons with knowledge of the claims, counterclaims and defenses asserted

5. Each party has a continuing obligation to provide the other party with additional documents and information supporting its position which were not previously, with every effort made to assure that the exchange of information is completed no later than 15 days before the hearing

B. Protective Orders

1. Shall be issued by the Arbitrator at the request of either party

2. Available only for proprietary information, trade secrets or other confidential information

C. Failure to Exchange

1. The Arbitrator shall not consider documents, information or things required to be exchanged which the parties have not previously exchanged unless the parties agree otherwise

2. The Arbitrator can sanction a party failing to cooperate in the required exchange of information by

a. Determining facts against that party
b. Refusing to allow that party to support or oppose certain claims, defenses or counterclaims

XVI. Pre-Hearing

A. The Arbitrator may call a pre-hearing conference to develop a stipulation of the facts and a joint statement of the issues, and to resolve any other open issues related to the conduct of the hearing

B. The Arbitrator has discretion to conduct the pre-hearing conference in person or by telephone

C. Prior to the hearing, the Arbitrator may require the parties to submit witness and exhibit lists and concise written statements, not to exceed 10 pages, of their respective positions

D. The Arbitrator may require or permit rebuttal statements

XVII. Hearing

A. Scheduling

1. The Case Manager shall serve a Notice of hearing on the parties setting the location, date and time of the hearing

2. In general, the hearing will be scheduled within 60 days after the commencement of the arbitration

3. The Case Manager will resolve disputes concerning the location and scheduling of the hearing

B. Waiver

1. The parties may agree to waive the right to a hearing

2. If a waiver of the hearing has been agreed to by the parties, the dispute will be submitted to the Arbitrator on written submissions

C. Subpoenas

1. A party seeking the attendance of witnesses or the production of documents may request that the Arbitrator issue subpoenas

2. If there are no objections to the issuance of subpoenas, they will be issued by the Arbitrator

3. A party objecting to the issuance of subpoenas may serve an objection, which shall be ruled on by the Arbitrator

D. Hearing Procedures

1. When a party fails or declines to appear at the hearing, the Arbitrator shall proceed with the hearing and require the party in attendance to present its case
2. At the Arbitrator's discretion, the hearing may be conducted in person, by telephone or by video conference
3. The order of presentation of the case shall be determined by the Arbitrator, generally following the order of a court trial
4. All testimony shall be given under oath

E. Evidence

1. The Arbitrator shall only consider evidence that he/she finds relevant and material to the dispute
2. The Arbitrator may elect to use the Federal Rules of Evidence and the Federal Rules of Civil Procedure to make evidentiary decisions

F. Privileges

1. Common law principles developed by the federal courts shall govern all privilege claims
2. The Federal Rules of Civil Procedure shall govern all work product claims

G. Settlement Negotiations

1. Prior settlement offers by the parties shall not be introduced or considered by the Arbitrator
2. Statements or recommendations by the mediator or any other person connected

with any efforts to resolve the dispute shall not be introduced or considered by the Arbitrator

H. Record

1. No stenographic record of the hearing shall be made automatically

2. The parties may agree to permit a stenographic record of the hearing

I. Closing of the Hearing

1. The Arbitrator shall declare the hearing closed when he/she determines that the parties have presented their arguments and relevant evidence

2. Post-hearing briefs are not permitted

3. Disputes concerning the closing of a hearing shall be determined by the Administrator

XVIII. Award

A. Timing

1. The Arbitrator shall render the award within 14 days after the date of the first day of the hearing

2. If there is no hearing, the Arbitrator shall render the award within 10 days after the date he/she received the parties submission and evidence

B. Standard for Award

1. The award shall be in wring [sic], signed and dated by the Arbitrator

2. The award shall state, as to each claim, which party prevailed and the amount

awarded or other relief granted, and shall direct payment of any amount due the prevailing party

C. Applicable Law

1. In making the award, the Arbitrator shall be guided by:

   a. The principles of the United States Arbitration Act (9 U.S.C. Sections 1-16) and court decisions thereunder

   b. Principles of federal telecommunications law stated in the Communications Act of 1934, as amended (47 U.S.C. Sections 151-609) and court decisions thereunder

   c. Decisions, orders, rules and regulations of the Federal Communications Commission

   d. Applicable MCI tariffs filed and maintained with the FCC

2. The Arbitrator has no discretion to deviate from the terms of any applicable publicly filed tariff

D. Relief

1. The Arbitrator may award remedies allowed by law

2. The relief granted is final and complete

3. The Arbitrator may not award interlocutory relief (including temporary or permanent injunctions), punitive damages, treble damages, or penalties other than those provided in any applicable publicly filed tariff

4. The Arbitrator may not award attorneys' fees

5. If the Arbitrator determines that the losing party had no reasonable basis in fact for disputing the position of the prevailing party with respect the MCI Statement of Account, the Arbitrator may assess all fees paid to the Administrator plus the Arbitrator's travel costs against the losing party

E. Issuance and Correction of Award

1. The Administrator shall serve copies of the award on the parties within 3 days after receiving it from the Arbitrator.

2. The date of issuance of the award is deemed to be the date the Administrator serves it on the parties

3. Within 7 days after the issuance of the award, a party may request that the Arbitrator correct computational, clerical, typographical or similar errors in the award

4. The Arbitrator shall make any appropriate corrections to the award within 7 days after receiving such a request

5. No substantive reconsideration of the award shall be permitted

6. The award shall be binding and final seven days after it is issued if no corrections have been requested or made, and if it has been corrected, it shall be binding and final 7 days after issuance of the corrected award

F. Compliance and Enforcement

1. Within 30 days after the date the award has become final and binding, the party against whom an award is rendered shall pay the amount awarded and otherwise comply with the award

2. If a party fails to pay with the 30 days or other time period ordered by the Arbitrator, interest will accrue in the amount due at the rate of 12% per annum or 1% per month, starting with the date the award was issued

3. Judgement may be entered on the award in federal or state court

4. All proceedings to confirm, modify or vacate an award shall be governed by the United States Arbitration Act (9 U.S.C. Sections 9-13)

XIX. General Provisions

A. Confidentiality

1. The parties, Case Manager, and Arbitrator shall treat the arbitration, conferences, exchange of information, hearing and award as confidential.

2. The proceedings shall not be disclosed except as required in a judicial proceeding to challenge or enforce an award, unless otherwise required by law

B. Privacy

1. The privacy of all conferences and hearings shall be maintained

2. The Arbitrator has discretion to permit any person having a direct interest in the arbitration to attend the conferences and hearing

3. The Arbitrator may exclude any person or non-party witness from any part of the hearing

C. Sanctions

1. The Arbitrator may impose sanction on a party who fails to comply with the Rules of Arbitration

2. Sanctions may include assessment of fees, prohibiting the introduction of certain evidence or ruling on an issue adversely to the party who failed to comply with the Rules of Arbitration.

D. Interpretation of Rules

1. Once appointed, the Arbitrator shall resolve disputes about the interpretation and application of the Rules of Arbitration.

2. Disputes arising before the appointment of the Arbitrator shall be decided by the Case Manager

E. Conflict with Law

1. If the arbitration of any claim conflicts with any applicable statute providing for exclusive jurisdiction of such claim in some other forum, the statute shall control

PROVISIONS INVOLVED

47 U.S.C.S. § 203(a) (1995):

Filing; public display. Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act [47 USCS §§ 151 et seq.] when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

47 C.F.R. § 61.2 (1997):

Clear and explicit explanatory statements. In order to remove all doubt as to their proper application, all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations.

47 C.F.R. § 61.54(j) (1997):

Rates and general rules, regulations, exceptions and conditions. The general rules (including definitions), regulations, exceptions, and conditions which govern the tariff must be stated clearly and definitely. All general rules, regulations, exceptions or conditions which in any way affect the rates named in the tariff must be specified. A special rule, regulation, exception or condition affecting a particular item or rate must be specifically referred to in connection with such item or rate. Rates must be expressed in United States currency, per chargeable unit of service for all communication services, together with a list of all points of service to and from which the rates apply. They must be arranged in a simple and systematic manner. Complicated or ambiguous terminology may not be used, and no rate, rule, regulation, exception or condition shall be included which in any way attempts to substitute a rate, rule, regulation, exception or condition named in any other tariff.

47 C.F.R. § 61.74(a) (1997):

References to other instruments. Except as otherwise provided in this and other sections of this part, no tariff publication filed with the Commission may make reference to any other tariff publication or to any other document or instrument.

47 U.S.C.S. § 201 (1995):

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the

orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful: Provided, That communications by wire or radio subject to this Act [47 USCS §§ 151 et seq.] may be classified into day, night, repeated, unrepeated, letter, commercial press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: Provided further, That nothing in this Act [47 USCS §§ 151 et seq.] or in any other provision of law shall be construed to prevent a common carrier subject to this Act [47 USCS §§ 151 et seq.] from entering into or operating under any contract with any common carrier not subject to this Act [47 USCS §§ 151 et seq.], for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: Provided further, That nothing in this Act [47 USCS §§ 151 et seq.] or in any other provision of law shall prevent a common carrier subject to this Act [47 USCS §§ 151 et seq.] from furnishing reports of positions of ships at sea to newspapers of general circulation, either at

a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act [47 USCS §§ 151 et seq.]

47 U.S.C.S. § 202 (1995):

(a) **Charges, services, etc.** It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) **Charges or services included.** Charges or services, whenever referred to in this Act [47 USCS §§ 151 et seq.], include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) **Penalty.** Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $6,000 for each such offense and $300 for each and every day of the continuance of such offense.

47 U.S.C.S. § 210 (1995):

(a) Nothing in this Act [47 USCS §§ 151 et seq.] or in any other provision of law shall be construed to prohibit common carriers from issuing or giving franks to, or exchanging franks with each other for the use of, their officers, agents, employees, and their families, or, subject to such rules as the Commission may prescribe, from issuing, giving, or exchanging franks and passes to or with other common carriers not subject to the provisions of this Act [47 USCS §§ 151 et seq.], for the use of their officers, agents, employees, and their families. The term "employees", as used in this section, shall include furloughed, pensioned, and superannuated employees.

(b) Nothing in this Act [47 USCS §§ 151 et seq.] or in any other provision of law shall be construed to prohibit common carriers from rendering to any agency of the Government free service in connection with the preparation for the national defense; Provided, That such free service may be rendered only in accordance with such rules and regulations as the Commission may prescribe therefor.

47 C.F.R. § 41.21 (1997):

No franks shall be issued by any carrier authorizing free service to any person on which the published charges would, in the aggregate, exceed $50 in any 1 calendar year; nor shall any person use or attempt to use any frank in any calendar year for free service on which the charges at the duly published rates would, in the aggregate, exceed $50.

47 U.S.C.S. § 414 (1995):

Nothing in this Act [47 USCS §§ 151 et seq.] contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of the Act [47 USCS §§ 151 et seq.] are in addition to such remedies.

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IN THE

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Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT

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---

BRIEF IN OPPOSITION FOR RESPONDENT

Respondent MCI Telecommunications Corporation ("MCI"), through its counsel, submits this brief in opposition to the Petition for a Writ of Certiorari ("Petition") filed by Petitioner Matrix Communications Corporation ("Petitioner"). Petitioner seeks review of a unanimous decision of the United States Court of Appeals for the First Circuit affirming the district court's order compelling arbitration and the district court's denial of Petitioner's motion under Federal Rule of

Civil Procedure 60(b) to vacate that order. The Petition is without merit and should be denied.

STATEMENT

Petitioner is a former external sales agent that sold telecommunications services for MCI. Effective October 1, 1995, Petitioner and MCI entered into an Authorized Sales Agent Agreement (the "Agent Agreement"). (App. 42.)[1/] The Agent Agreement granted Petitioner a limited agency to sell MCI services to certain categories of customers in return for commissions based on the amount of telephone usage generated by those customers. (App. 42-43, 45.)

The Agent Agreement authorized MCI to terminate the contract upon ten days' notice if MCI discovered "irregular marketing activity" by Petitioner. (App. 55.) In the spring of 1996, MCI discovered substantial irregular marketing activity, including the use by Petitioner of unauthorized subagents to sell services under the agreement, widely disseminated unapproved advertising, and the misuse of MCI's name and marks. (App. 51-53; R. 286-98.) MCI terminated the Agent Agreement because of those breaches. (R. 287.)

In June 1996, Petitioner sued MCI in Massachusetts state court. (R. 10.) The complaint alleged a variety of tort and

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1/ In this Brief, citations to the Appendix filed by Petitioner are designated "App. ___." Citations to the Record on Appeal in the lower court are designated "R. __," and citations to the Addendum to the Record on Appeal, filed by MCI as an attachment to its brief in the lower court, are designated "R. Ad. ___."

statutory claims against MCI, all of which derived from the performance or termination of the Agent Agreement. (R. 10-22.) MCI removed the action to federal court and, in July 1996, moved to compel arbitration pursuant to the arbitration clause in the Agreement. (R. 41, 99.)

The Agent Agreement's arbitration clause is express and unequivocal. It provides:

> Any dispute relating to this Agreement shall be submitted for binding arbitration in accordance with the rules contained in MCI Tariff FCC No. 1 and judgement [sic] on any award entered therein may be entered in any court of competent jurisdiction.

(App. 59.)

Petitioner opposed MCI's motion to compel arbitration. Petitioner argued that because the Agent Agreement's arbitration clause incorporated MCI's Tariff arbitration rules by reference, the only disputes that could be arbitrated were those involving MCI's invoices for services provided to customers under MCI's Tariff. (R. 329-31.)[2/]

On September 27, 1996, the district court heard argument on MCI's motion to compel arbitration. During the hearing,

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2/ MCI's Tariff contains arbitration rules that govern the conduct and procedure for arbitrations initiated under the Tariff. (R. Ad. 26-33.) Those rules include a provision that requires arbitration of all disputes between MCI and its customers involving the payment of invoices over $10,000. (R. Ad. 26.) In the original district court proceeding, Petitioner based its opposition to arbitration on this provision.

the court indicated that it intended to direct arbitration of the claims in Petitioner's complaint. (R. 918, 928, 935, 940.) Later that day, the judge signed an order compelling arbitration. (R. 976-77.) Before that order was entered, however, Petitioner filed a notice of voluntary dismissal under Federal Rule of Civil Procedure 41(a)(1)(i). (App. 35-36.) Because MCI had not yet answered Petitioner's Amended Complaint, the case was dismissed, and Petitioner circumvented the district court's ruling. (App. 36.)

On the next business day after the hearing, Petitioner commenced an arbitration against MCI before J.A.M.S./Endispute ("JAMS"), the appropriate arbitration administrator as established by the arbitration rules in the Tariff. (R. Ad. 28.) JAMS appointed as arbitrator a former chief justice of the Massachusetts Superior Court. (R. 2169.) Neither party objected to the appointment, finding the arbitrator to be unbiased, impartial, and qualified. (R. Ad. 30; R. 2169; App. 28.)

In its Notice of Claim in the arbitration, Petitioner submitted a copy of the Amended Complaint from the action that Petitioner had voluntarily dismissed, and asked the arbitrator to decide: (1) whether the claims alleged in the Amended Complaint were arbitrable, and (2) whether the arbitrator had jurisdiction to award all of the relief sought by Petitioner, including punitive damages and attorneys' fees.[3/] (R. 2031-34.) Consistent with its strategic maneuvering in the district court, Petitioner also sought to hedge its bets by indicating that it would not consider itself bound by a decision

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3/ The arbitrator eventually concluded that Petitioner's claims were arbitrable. (R. 2303-04.)

that Petitioner's claims were arbitrable. (App. 4; R. 973-74, 2033.)

In an effort to eliminate uncertainty regarding the arbitrability issue, MCI filed suit in the District of Massachusetts seeking a declaratory judgment that Petitioner must arbitrate its claims. (R. 988.) It is this action that gave rise to the appeal underlying this Petition.

On October 10, 1996, the district court entered an order holding that the arbitration clause in the Agent Agreement is valid and enforceable, and that Petitioner therefore was required to arbitrate all disputes relating to the contract, including the claims that Petitioner had voluntarily dismissed. (App. 25-26.) Petitioner appealed that order.

While its appeal was pending, Petitioner filed a motion in the district court under Federal Rule of Civil Procedure 60(b) seeking to vacate the order compelling arbitration. In its Rule 60(b) motion, Petitioner claimed, among other things, that MCI had fraudulently induced Petitioner to agree to the arbitration clause in the Agent Agreement by failing to disclose the existence of an agreement between MCI and JAMS that governs the terms and logistics for JAMS' administration of arbitrations under MCI's Tariff arbitration rules. (R. 1143.)

On March 20, 1997, the district court heard argument on Petitioner's Rule 60(b) motion. During the hearing, Petitioner conceded that the Tariff identified JAMS as the administrator for all arbitrations under MCI's Tariff arbitration rules. (App. 28.) Petitioner also conceded that corporate arbitration programs are "commonplace." (App. 28.) Finally, Petitioner conceded that it was not challenging the impartiality of the arbitrator appointed by JAMS to hear its dispute with MCI. (*See* App. 28.)

On March 27, 1997, the district court entered an order denying Petitioner's Rule 60(b) motion. The court found that the Rule 60(b) motion failed "the due diligence test" for the discovery of new evidence and flunked "the materiality test" for the importance of that evidence. (App. 28.)

Petitioner appealed the district court's order denying the Rule 60(b) motion. The First Circuit consolidated that appeal with Petitioner's earlier appeal from the October 10, 1996 order compelling arbitration.

In a consolidated decision rendered on January 27, 1998, the First Circuit unanimously affirmed both orders entered by the district court. (App. 1-23.)

In the first appeal, the court of appeals held that the arbitration clause in the Agent Agreement applies to any dispute relating to the Agent Agreement, including all of the claims that Petitioner had asserted in its earlier lawsuit. (App. 9-11.) The court rejected Petitioner's argument that because the arbitration clause incorporates the Tariff arbitration rules, only customer billing disputes may be arbitrated under the Agent Agreement. (App. 9-10.) Instead, the court ruled that the Tariff's arbitration rules were incorporated merely to provide "a set of procedural rules for arbitrations arising from the Agent Agreement."[4/] (App. 9-10.)

4/ Similarly, the court of appeals rejected Petitioner's argument that the reference in the arbitration clause to the Tariff "rules" incorporated all of the "Rules and Regulations" section in the Tariff, which contains a set of general provisions -- such as service descriptions, liability limitations, payment procedures, and the like -- governing the terms and conditions of MCI's provision of service to its customers. The court

Having affirmed the original order compelling arbitration, the court turned to Petitioner's appeal from the order denying the Rule 60(b) motion. In that appeal, Petitioner raised a variety of arguments attempting to show that the JAMS administration agreement evidenced an improper relationship between MCI and JAMS and suggested bias in favor of MCI. The First Circuit rejected each of Petitioner's contentions.

Employing an abuse-of-discretion standard, (App. 17), the court first affirmed the district court's finding that the JAMS administration agreement was not material because it would have not have had a significant effect on the district court's earlier decision compelling arbitration. (App. 19.) Although Petitioner complained that the JAMS agreement contained an "undisclosed" rule prohibiting the arbitrator from making findings of fact and conclusions of law, the court of appeals noted that the law does not require arbitrators to give any reasons at all for an award and found that, in any event, "there is no reason whatever to think that Matrix would have regarded such a position as material." (App. 20-21.) In addition, the

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found it "much more reasonable" to interpret the reference to "rules" as referring to "the limited set of rules concerning arbitration than to all nineteen rules contained in Section B of the Tariff on a broad range of subjects." (App. 10-11.) The First Circuit also dismissed Petitioner's argument that MCI had fraudulently induced it to enter into the arbitration clause through representations from MCI officials that the clause applied only to customer billing disputes. The court held that Petitioner waived that argument by failing to raise it in a timely fashion in the district court, a violation of the court's "bedrock principle that new arguments may not be made on appeal." (App. 12.)

court rejected Petitioner's argument that findings of fact and conclusions of law were required to establish a "willful misconduct" exception to a limitation-of-liability provision in the Tariff, finding that provision was "inapplicable" to Petitioner's claim.[5/] (App. 20.)

The court of appeals next rejected Petitioner's argument that the JAMS agreement evidenced improper "payments and perks" by MCI to JAMS that could create bias in favor of MCI. (App. 21.) Noting that the services that were to be provided by MCI to JAMS under the agreement were for use in connection with the tasks JAMS was required to provide under the contract, the court stated that it saw "nothing sinister in the communications company contracting to provide the 'tools' for the work it seeks to obtain from its contractor, particularly when those tools are its stock-in-trade." (App. 21.) Furthermore, the court recognized that the payments specified in the contract were for the administrative services provided by JAMS. (App. 21.)

Third, the court of appeals rejected Petitioner's argument that the JAMS administration agreement was "undisclosed" for purposes of Rule 60, holding that Petitioner knew or should have known that JAMS had a contractual relationship with MCI because the Tariff arbitration rules prominently disclosed JAMS as the administrator of MCI's arbitration program. (App. 22.) As the court recognized, "Matrix should have

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5/ The limitation-of-liability provision is located in the general Rules and Regulations section of the Tariff and not in the arbitration rules. The court noted that the issue was moot because the arbitrator had already announced his intention to make findings and conclusions notwithstanding the prohibition in the JAMS agreement. (App. 20.)

known as well that the two parties [MCI and JAMS] must have spelled out their working relationship in some form; we think it virtually inconceivable that there would be no written contract between them." (App. 22.) The court dismissed Petitioner's argument that the content of the agreement was "secret," observing that "many of the terms Matrix claims to find shocking in the MCI/JAMS Agreement were included in MCI's public request for bids for a contract to administer its arbitration program." (App. 22.)

Finally, the First Circuit rejected Petitioner's argument that the existence of the JAMS agreement demonstrated bias in the arbitration process. (App. 22-23.) The court noted that MCI's contract was with the arbitration administrator -- not the arbitrator -- and that MCI did not have any contacts with the arbitrators who were deciding cases. (App. 22.) The court of appeals further concluded that, on the facts of this case, Petitioner's suggestion that a JAMS arbitrator would be biased in favor of MCI was "contradicted by [Petitioner's] explicit assurance that it did not doubt the impartiality of the arbitrator assigned to its case." (App. 23.)

ARGUMENT

The Petition does not present an issue appropriate for this Court's review. The decision below simply applied the unambiguous language of an arbitration clause to a particular dispute and held that the district court's denial of a Rule 60(b) motion to vacate an order compelling arbitration was well within the appropriate range of discretion. While Petitioner claims that the court of appeals' decision conflicts with this Court's decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), the two decisions are in fact entirely consistent. Unlike in *Commonwealth Coatings*, MCI in this case has no relationship

with the arbitrators who actually decide disputes and Petitioner does not claim the arbitrator is biased. Likewise, Petitioner's effort to transform this contract case into a dispute governed by the filed-tariff doctrine is unavailing. It is Petitioner's agency contract with MCI, not MCI's Tariff, that controls Petitioner's relationship with MCI. Finally, Petitioner's attempt to manufacture a circuit split between the decision below and the Ninth Circuit's decision in *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir.), *cert. denied*, 116 S. Ct. 275 (1995), fails because this case does not involve a statute enacted to protect parties in Petitioner's position. To the extent that Petitioner reads *Graham Oil* broadly to bar any limitations on the remedies available in arbitration, that construction has been effectively superseded by this Court's decision in *Mastrobuono v. Shearson, Lehman Hutton, Inc.*, 115 S. Ct. 1212 (1995).

This Petition is the latest in a protracted series of efforts by Petitioner to avoid arbitration. Petitioner began by contesting the scope of the arbitration clause in the district court. When that argument was rejected, Petitioner dismissed its own lawsuit to dodge the court's impending order compelling arbitration, which the court had outlined in open court during the hearing. Then, when MCI filed another action to resolve the arbitrability issue and the court issued a binding order compelling arbitration, Petitioner filed a Rule 60(b) motion seeking to vacate that order, claiming that the JAMS agreement biased the arbitration process. When that argument also failed, Petitioner, in its appeal, raised new arguments, not timely presented in the district court, attempting to challenge the validity and enforceability of the arbitration clause on grounds of fraud. Now that the First Circuit has affirmed the district court's orders, Petitioner seeks discretionary review by this Court, raising yet another new argument to avoid compliance with the arbitration provision of the contract in question.

As demonstrated below, Petitioner's effort to avoid arbitration and transform a run-of-the-mill commercial dispute into a matter worthy of Supreme Court review should be rejected.

I. THE DECISION BELOW AFFIRMING THE DENIAL OF PETITIONER'S RULE 60(B) MOTION WAS PLAINLY CORRECT AND IS CONSISTENT WITH THE CONTROLLING PRECEDENTS OF THIS COURT.

In Question One, Petitioner seeks review of the First Circuit's decision affirming the district court's denial of Petitioner's Rule 60(b) motion. In that motion, Petitioner argued that the existence of an administrative agreement between MCI and JAMS, the company that administers arbitrations under MCI's Tariff, "nullifies any waiver" by Petitioner of its right to a jury trial -- *i.e.*, its agreement to arbitrate. Petitioner further alleged that it had recently become aware of the agreement between MCI and JAMS, and argued that the agreement constituted an improper relationship between MCI and JAMS sufficient to invalidate the arbitration clause in the Agent Agreement.

The issue before the First Circuit was whether the district court had abused its discretion in denying Petitioner's Rule 60(b) motion. (App. 17.) In order to vacate a final judgment under Rule 60(b), a movant must present newly discovered evidence that could not have been discovered in time to move for a new trial under Rule 59(b). Fed. R. Civ. P. 60(b)(2). In addition, the movant must show that the newly discovered evidence is of such a material and controlling nature as would probably have changed the outcome of the proceeding. *See, e.g., Hoult v. Hoult*, 57 F.3d 1, 6 (1st Cir. 1995). A district court's decision denying a Rule 60(b) motion is reviewed for

abuse of discretion. *Browder v. Director, Dept. of Corrections*, 434 U.S. 257, 263 n. 7 (1978).

The court of appeals clearly understood those standards and faithfully applied them, arriving at a decision that is correct and unworthy of further review. MCI respectfully suggests that this Court does not sit to review application of an abuse-of discretion standard to the denial of a motion to vacate a judgment under Rule 60(b).

Nor does the underlying issue -- whether an administrative agreement between a corporation and an arbitration administrator evidences bias in the arbitration process -- warrant review here. The court of appeals' holding that, on the facts of this case, the administration agreement would not have been material and that Petitioner should have known of the agreement's existence during the original proceeding does not conflict with the decisions of this Court or of any other circuit. Moreover, the dearth of case law on the issue (all of which, in any event, is consistent with the First Circuit's decision) is testament to the fact that the issue simply is not one of substantial importance.

Petitioner attempts to justify review of this issue by asserting that the decision below conflicts with the Court's decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968). There is no merit to this argument.

In *Commonwealth Coatings*, the Court vacated an arbitration award because one of the arbitrators had significant business dealings with a party and failed to disclose that business association to the other participants in the arbitration. *Commonwealth Coatings Corp.*, 393 U.S. at 146. Here, in contrast, MCI, like many other corporations, merely has an

agreement with an organization to administer an arbitration program. MCI has no relationship with the arbitrators themselves, who are independent and who are bound by a Code of Ethics. As the court of appeals recognized, none of the contacts between MCI and JAMS reflected in the administration agreement involve the arbitrators who are deciding cases. (App. 22.)

This distinction between an arbitrator and arbitration administrator is critical. Indeed, every court to consider the issue has rejected the argument that an arbitration process will be biased because of a relationship between a party and the arbitration administrator. *See, e.g., Doctor's Assocs. v. Stuart*, 85 F.3d 975, 981 (2d Cir. 1996); *Doctor's Assocs. v. Jabush*, 89 F.3d 109, 112 (2d Cir. 1996); *Hunt v. Mobil Oil Corp.*, 654 F. Supp. 1487, 1499 (S.D.N.Y. 1987); *cf. Sheet Metal Workers v. Kinney Air Conditioning Co.*, 756 F.2d 742, 746 (9th Cir. 1985).

The fact that the courts uniformly reject claims of bias that are based on a relationship between a party and the arbitration administrator demonstrates that the Petition does not present a substantial question of law, and firmly supports the reasoning of the court of appeals. As the court of appeals correctly observed, the JAMS agreement would not have been material to Petitioner's decision whether to enter into the arbitration agreement, and would not have changed the outcome of MCI's motion to compel arbitration. (App. 22.)

The agreement establishes JAMS as the administrator for certain arbitrations commenced under MCI's Tariff and establishes an organized infrastructure for those arbitrations. That infrastructure benefits both parties equally and creates an efficient process. JAMS, for example, provides a centralized case scheduling and tracking system, an electronic docketing

system, and a case manager for every matter. (R. 1186-89.) It also maintains a panel of arbitrators who have "demonstrated neutrality and impartiality in professional practice" and requires that they execute an oath of office and agree to abide by the Code of Ethics for Commercial Arbitrators. (R. 1189-90.) The arbitrators are not employees of JAMS, are not parties to the JAMS agreement, and have no professional relationship with MCI. (*See* R. 1189-90, 1740.) Thus, Petitioner's bold assertion that the arbitrators -- former judges, respected practitioners, and the like -- will depart from their Code of Ethics is unfounded. And Petitioner's attempt to avoid arbitration on this ground borders on the frivolous given its concession before the district court that it does not challenge the impartiality of the arbitrator assigned to its case. (App. 23.)

Equally important, Petitioner ignores the Rule 60(b) procedural framework in which this issue arose. As the court of appeals concluded, Petitioner nevertheless would have lost below because it knew or should have known of the existence of the JAMS agreement. MCI's Tariff publicly disclosed that JAMS was the administrator for all arbitrations under the Tariff, MCI's agreement with JAMS was the subject of publicity and public discussion, and private corporate-sponsored arbitration programs in general are common and have been the subject of public news articles. (R. 1783-87.) The court of appeals correctly concluded that Petitioner knew or should have known of the existence of the JAMS agreement because it would be "virtually inconceivable that there would be no written contract between [JAMS and MCI]." (App. 22.)

In sum, the First Circuit's affirmance of the denial of Petitioner's Rule 60(b) motion presents no substantial question of law worthy of the Court's review, was fully consistent with prior decisions of the Court, and was plainly correct.

II. THIS IS A CONTRACT CASE AND DOES NOT INVOLVE THE FILED-TARIFF DOCTRINE OR ANY OTHER "TARIFF FILING REQUIREMENTS."

In Question Two, Petitioner for the first time invokes the federal filed-tariff doctrine, arguing that MCI violated "tariff filing requirements" by not explicitly disclosing the existence of the JAMS agreement in its Tariff. Petitioner has waived this issue because Petitioner failed to raise it before the district court or the court of appeals. *See, e.g., United States v. Alvarez-Sanchez*, 511 U.S. 350, 359 n.5 (1994). Even if it were not waived, Question Two does not present a substantial question of law warranting review by the Court.

Petitioner's invocation of the filed-tariff doctrine and its repeated references to "tariff filing requirements" are red herrings because this dispute between MCI and Petitioner is controlled by their agency contract, not MCI's Tariff. As a common carrier under the Federal Communications Act, 47 U.S.C. § 151 *et seq.*, MCI has filed a tariff with the Federal Communications Commission that contains all of MCI's charges, classifications, practices, and regulations for the provision of telecommunications service to its telecommunications customers. 47 U.S.C. § 203(a). While, as Petitioner correctly notes, tariffs "conclusively and exclusively control the rights and liabilities between a carrier and its customer," *MCI Telecomms. Corp. v. Graham*, 7 F.3d 477, 479 (6th Cir. 1993), they do not govern the carrier's other business relationships, including those with agents like Petitioner.

In a similar vein, Petitioner misapplies the filed-tariff doctrine when it contends that MCI was required to disclose the JAMS agreement in the Tariff because of "tariff filing requirements" prohibiting the use of "side agreements." (Petition 19-21.) It is true that in a carrier-customer context, a

carrier's filed tariff supersedes any "side agreements" between a carrier and a customer concerning the provision of telecommunications service at charges, rates, classifications, or practices different from those specified in the tariff. 47 U.S.C. § 203(c); *Marco Supply Co. v. American Tel. & Tel. Co.*, 875 F.2d 434, 436 (4th Cir. 1989); *see also Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981); *Armour Packing Co. v. United States*, 209 U.S. 56, 81 (1908). But the prohibition of "side agreements" applies only to those agreements with customers concerning the provision of services at terms that contradict the tariff.

At bottom, this case concerns only the interpretation of an arbitration clause in a private, commercial agency contract between MCI and Petitioner. MCI's Tariff is relevant to this action only insofar as it is the document from which the arbitration rules are borrowed by the separate, independent arbitration clause in the Agent Agreement. (*See* App. at 9-10.) Thus, the issue presented below simply involved the incorporation by reference doctrine, a staple of contract law. This dispute is not a filed-tariff doctrine case and does not implicate any of the attendant federal tariff policies.

III. THE TARIFF'S LIMITATION OF LIABILITY EXCEPTION FOR "WILLFUL MISCONDUCT" DOES NOT AFFECT PETITIONER'S CONTRACTUAL OBLIGATION TO ARBITRATE.

In Question Three, Petitioner suggests that it is not required to arbitrate its disputes because of a "willful misconduct" exception to the limitation-of-liability provision in MCI's Tariff. The limitation-of-liability provision is found in the general Rules and Regulations section of the Tariff, and it limits MCI's liability in connection with disputes with its customers over the installation, provision, maintenance or

termination of telecommunications services. (R. 2374.) The "willful misconduct" provision cited by Petitioner operates as an exception to that limitation of liability. It provides that "MCI's liability for willful misconduct, if established as a result of judicial or administrative proceedings, is not limited by this tariff." (R. 2374.)

Question Three does not present any important legal question for review by this Court. In a tortured syllogism, Petitioner argues that because it alleges willful misconduct against MCI, the willful-misconduct exception to the limitation-of-liability provision in the Tariff affords Petitioner an "absolute right to proceed in Court." (Petition at 22.) Petitioner is wrong.

Even if the willful misconduct exception applied here -- which it does not because this is not a carrier-customer dispute governed by the Tariff -- nothing in that exception nullifies Petitioner's independent and voluntary agreement to arbitrate disputes related to the Agent Agreement. As the court of appeals recognized, the Agent Agreement arbitration clause does not incorporate the "willful misconduct" exception to the limitation of liability provision in MCI's Tariff. (App. 20.) Rather, "[t]he only sensible reading [of the arbitration clause] is that the Tariff was incorporated to provide a set of procedural rules for arbitrations arising from the Agent Agreement." (App. 9-10.)

Finally, Petitioner's reliance on *MCI Telecommunications Corporation v. TCI Mail, Inc.*, 772 F. Supp. 64 (D.R.I. 1991), is misplaced. *TCI Mail* holds that all the terms and conditions contained in the Tariff, including the "willful-misconduct" exception, must be considered when a court determines the effect of the Tariff on a rate dispute governed by the Tariff. *TCI Mail*, 772 F. Supp. at 67-68. *TCI Mail* did not, however,

address the issue whether the willful-misconduct exception permits a party to litigate in court notwithstanding the existence of a separate agency contract containing an arbitration agreement requiring that party to arbitrate all of its disputes. Unlike *TCI Mail*, which involved a carrier-customer relationship governed by the Tariff, the Tariff is relevant here only insofar as the arbitration clause in the Agent Agreement incorporates by reference the arbitration rules contained in the Tariff. The willful-misconduct exception was not incorporated into the arbitration agreement and is not relevant to this dispute.

IV. THERE IS NO CONFLICT BETWEEN THE FIRST AND NINTH CIRCUITS.

In its final effort to obtain review, Petitioner argues that the arbitration provision in the Agent Agreement is unenforceable because it precludes Petitioner from recovering multiple damages under the Massachusetts consumer fraud statute and under the Lanham Act; from recovering attorneys' fees under those two statutes and the Federal Communications Act; from taking advantage of a two-year limitations period under the Communications Act; and from obtaining "interlocutory" relief from the arbitrator. (Petition 26-28.) Petitioner bases its argument on Section B-7.13812 of the Tariff Arbitration Rules, which provides:

> The arbitrator is empowered to award remedies allowed by law and to grant final and complete relief. Notwithstanding this authority, the arbitrator may not award any interlocutory relief, including temporary or preliminary injunctions, nor may the arbitrator award punitive damages, treble damages, or penalties other than those provided in any applicable publicly filed tariff, nor may the arbitrator assess attorney's fees.

(R. Ad. 32.)

Like the other questions posed in the Petition, this issue is inappropriate for the Court's review. The decision below does not present an important question of federal law, and does not conflict with this Court's prior decisions or with the decisions of any other circuit. In addition, like the issue in Question Two, Petitioner waived this argument by failing to raise it in the district court.[6/]

The court of appeals properly rejected this argument because under the applicable arbitration rules, Petitioner must present any issues concerning limitation of remedies to the arbitrator, not to a court. *See Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 230-31 (3d Cir.) (once a dispute is deemed arbitrable, any argument that provisions of the arbitration agreement involve a waiver of substantive rights afforded by the state statute should be presented in arbitration), *cert. denied*, 118 S. Ct. 299 (1997); *Paine Webber, Inc. v. Elahi*, 87 F.3d 589, 599-600 (1st Cir. 1996). Here, the arbitration rules incorporated by the arbitration clause in the Agent Agreement specifically provide that the arbitrator must determine questions concerning jurisdiction and application of the arbitration rules. (R. Ad. 33.) The court of appeals recognized this fundamental problem with Petitioner's claim, and summarily rejected it for this reason. (App. 14 n.12.)

Moreover, even if this argument could be raised in court instead of arbitration, it fails because it is well established that

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6/ The court of appeals expressly noted the "question of waiver" surrounding this issue, but quickly rejected the argument on other grounds without reaching the waiver issue. (App. 14 n.12.)

a party may contract to limit available remedies. *See Mastrobuono v. Shearson, Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1214 (1995). Petitioner validly contracted to arbitrate disputes pursuant to a set of arbitration rules that circumscribed its ability to obtain certain forms of relief.[7/] And Petitioner's claim that the arbitration rules deprive Petitioner of the right to obtain injunctive relief (Petition at 27) is frivolous. The arbitration rules to which Petitioner agreed prohibit "interlocutory" relief, but do not prohibit permanent *injunctive* relief. (*See* R. Ad. 32.)

Finally, Petitioner's attempt to manufacture a circuit split on this issue is specious. According to Petitioner, the decision below conflicts with the Ninth Circuit's decision in *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir.), *cert. denied*, 116 S. Ct. 275 (1995). In *Graham Oil*, the court of appeals reversed an order compelling arbitration on the ground that the arbitration clause's limitation of remedies violated the Petroleum Marketing Practices Act, a statute that had been enacted to provide specific remedies to petroleum franchisees who were at the mercy of petroleum franchisors' superior bargaining power. As the court of appeals recognized, the two statutes under which Petitioner has asserted claims, the Lanham Act and Mass. Gen. Laws c.93A, unlike the Petroleum Marketing Practices Act, are not statutes that were created

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7/ Petitioner also ignores that the Agent Agreement independently precludes recovery of many of the damages sought by Petitioner. Paragraph 15(d) of the Agent Agreement provides that "NEITHER PARTY WILL BE LIABLE TO THE OTHER FOR SPECIAL, INDIRECT, CONSEQUENTIAL DAMAGES, WHETHER OR NOT FORESEEABLE, OR PUNITIVE DAMAGES." (App. 57, capitalization in original.)

specifically for the purpose of protecting parties in Petitioner's position. (App. 14 n.12.)

Moreover, to the extent that Petitioner construes *Graham Oil* to hold that parties cannot contract to limit the remedies available in arbitration, that construction cannot be considered good law in light of the Court's decision in *Mastrobuono v. Shearson, Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1214 (1995). *Mastrobuono* stands for the proposition that courts should effect the intent of parties' contractual agreements to arbitrate, even if that means enforcing the parties' agreement to limit the remedies available in arbitration. *See Mastrobuono*, 115 S. Ct. at 1216 (quoting *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989)); *see also National Union Fire Ins. Co. v. Belco Petroleum Corp.*, 88 F.3d 129, 134 (2d Cir. 1996); *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 320 (9th Cir. 1996); *Elahi*, 87 F.3d at 593; *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 998 (5th Cir. 1995). Here, Petitioner and MCI agreed to arbitrate all disputes in accordance with arbitration rules that prohibited the recovery of treble damages and attorneys' fees. The court of appeals understood this dynamic and properly rejected Petitioner's attempt to invalidate the arbitration clause in view of Petitioner's own agreement to limit the remedies available in arbitration.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1997

MATRIX COMMUNICATIONS CORPORATION,

Petitioner,

vs.

MCI TELECOMMUNICATIONS CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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I. INTRODUCTION

MCI's brief contains serious misrepresentations and omissions concerning the merits of the underlying case, the proceeding in front of the lower courts, and Matrix's position throughout. Rather than addressing all of MCI's misstatements, Matrix will confine its response to the core issues before this Court.

II. ARGUMENT

One of the fundamental issues in this case is whether MCI, one of the most powerful telecommunications corporations, can force small firms to arbitrate under circumstances where MCI has an undisclosed agreement with an arbitration provider concerning the arbitration of MCI'S disputes, which calls for substantial undisclosed payments by MCI to its arbitration panel and for *ex parte* communications between MCI and that arbitration provider, all of which are concealed from the parties opposing MCI in arbitration. It is undisputed that the MCI/JAMS Agreement creates such a relationship and since discovering the MCI/JAMS Agreement, it has been the position of Matrix that MCI's failure to disclose the Agreement and the full nature and scope of its relationship with JAMS violate federal statutes and represents an unprecedented assault on both the concept of fairness and the principles that must safeguard the integrity of the arbitration process.

Rather than addressing this important question on its merits, MCI totally distorts the true facts by asserting that "petitioner also conceded that corporate arbitration programs are commonplace" (MCI Brief, p. 5) and by implication that the MCI/JAMS Agreement is also commonplace. What MCI fails to disclose to this Court is the balance of the statement by Counsel for Matrix that "[w]hat is not commonplace is elaborate undertakings between the corporate sponsor and the arbitration service which are not disclosed to the participants." (Tr. p. 12)

MCI's argument is based on a statement lifted totally out of context. (Tr. pp. 6, 11 and 12) The transcript reveals the following statements made by Matrix's counsel at the same hearing:

a. [The MCI/JAMS Agreement is] . . . an undisclosed agreement . . . which we believe is unprecedented in this industry. (Tr. p. 6);

b. . . . this is not a customary agreement. (Tr. p. 6);

c. There's no evidence in the record that anybody else in the world had these kinds of agreements. (Tr. p. 11); and

d. . . . We will produce expert testimony which will contradict the recent submissions by MCI that this is something commonplace. (Tr. p. 12).

And finally the full accurate statement:

e. What is commonplace is corporation-sponsored arbitration. What is not commonplace is elaborate undertakings between the corporate sponsor and the arbitration service which are not disclosed to the participants. (Tr. p. 12)

The transcript is entirely different than what MCI would have this Court believe. What Matrix has consistently said in open Court and in all of its pleadings is that the undisclosed MCI/JAMS Agreement is not "commonplace" but, in fact, is an unprecedented denial of due process.

MCI further asserts that "Petitioner conceded it was not challenging the impartiality of the arbitrator." (MCI Brief, pp. 5, 9 and 14) This is totally untrue. The fact is, Matrix did not initially object to the JAMS arbitrator from the outset because the arbitrator was appointed by JAMS prior to Matrix learning of the undisclosed agreement between MCI and JAMS and the arbitrator did not disclose the agreement to Matrix upon being appointed.

However, since discovering the undisclosed MCI/JAMS Agreement, Matrix has always contended that the failure to disclose the Agreement is a serious breach of the disclosure requirements of the Code of Ethics for Arbitrators in Commercial Arbitrations and constitutes a "manifest violation of the strict morality and fairness Congress would have expected on the part of the arbitrator and the other party in the case" as articulated by this Court in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968). As such, the requisite impartiality of the arbitrator is so seriously compromised by not disclosing the MCI/JAMS Agreement that Matrix is not required to continue with the arbitration much less demonstrate bias on the part of the arbitrator.[1]

MCI makes the further specious argument that any conflict created by the MCI/JAMS Agreement does not implicate JAMS' arbitrators because they are not employees of JAMS, are not parties to the Agreement, and are independent of JAMS. (MCI Brief pp. 9, 12 and 14) What MCI fails to disclose is that JAMS is a for profit corporation in which JAMS' arbitrators are the shareholders, officers and directors. Furthermore, JAMS' arbitrators are required by JAMS to provide all their alternative dispute resolution services exclusively through and for JAMS. As such, the arbitrators are not independent of JAMS but have an intertwined relationship with JAMS the corporation in which they directly benefit financially from the secret payments MCI makes to JAMS.

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[1] The lack of integrity in the MCI/JAMS arbitration process and the partiality of the arbitrator are further evidenced by the arbitrator's decision to dismiss Matrix's claims with prejudice without ever hearing the claims and while the parties were still awaiting a ruling by the Court of Appeals.

A. The Decision Below Affirming The Denial Of Petitioner's Rule 60(b) Motion Was Not Correct And Is Not Consistent With The Controlling Precedent Of This Court

MCI seeks to distinguish *Commonwealth Coatings, supra,* by stating that "the Court vacated an arbitration award because one of the arbitrators had significant business dealing with a party and failed to disclose that business association to the other participants in the arbitration." What MCI describes as "a significant business relationship" involved fees of about $12,000.00 paid over a period of four or five years but was no longer an ongoing relationship. In contrast, MCI's relationship with JAMS is an ongoing relationship in which MCI has secretly paid over $280,000.00 to JAMS and continues to pay each year $60,000.00 to JAMS plus providing tens of thousands of dollars of free long distance services to JAMS, and paying referral fees when JAMS asserts jurisdiction over cases. All this is undisclosed to parties opposing MCI in arbitration and is in addition to the other compensation JAMS receives as MCI's Tariff arbitration administrator.

MCI's narrow reading of *Commonwealth Coatings* does not account for the gravity and scope of this Court's decision which expressed concern not only with preserving the impartiality of arbitrators but was more broadly concerned with safeguarding "the strict morality and fairness" required in "the arbitration process." In writing for this Court, Mr. Justice Black stated that "[w]e can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." 393 U.S. at 149. It is the integrity of the "arbitration process" that this Court was "scrupulous to safeguard" in *Commonwealth Coatings.* Similarly, if not overturned, the case before this Court will serve to undermine, if not destroy entirely, the integrity of the "arbitration process."

MCI further argues that Matrix should have known there was such an agreement between MCI and JAMS. This argument belies the fact that neither Matrix nor any other party opposing MCI in arbitrations before JAMS had any knowledge of this undisclosed Agreement and that MCI's failure to disclose the MCI/JAMS Agreement violates: a) four major provisions of the Federal Communications Act (§§ 201, 202, 203 and 210); b) Section 41.21 of the Code of Federal Regulations; c) Rule B-4.02 of MCI's Tariff; d) the Code of Ethics for Arbitrators of Commercial Disputes; and e) Sections 1-14 of the Federal Arbitration Act. MCI does not dispute in its Brief these violations.

B. Matrix Raised The Filed Tariff Doctrine In Both The District Court And Appellate Court

In its Brief MCI cites Section 203 of the Communications Act, commonly referred to as the filed tariff doctrine, when its states that "[a]s a common carrier under the Federal Communications Act . . . MCI has filed a tariff with the Federal Communications Commission that contains all of MCI's charges, classifications, practices, and regulations for the provision of telecommunications services to its telecommunications customers." In spite of MCI's representation, the actual fact is that MCI Tariff does not "contain[ ] **all** of MCI's **charges, classifications, practices,** and **regulations**" (emphasis added) concerning the provision of telecommunications services. In fact, MCI/JAMS Agreement violates all four principles of the filed tariff doctrine:

> **Charges.** By providing JAMS free long distance service, the MCI/JAMS Agreement creates charges that are not disclosed in the MCI Tariff.
>
> **Classifications.** By providing JAMS free long distance service, the MCI/JAMS Agreement creates a classification of customer, in which a customer receives free long distance

services in exchange for providing dispute resolution services for MCI, that is not disclosed in the MCI Tariff.

Practices. By providing for substantial undisclosed payments and perks to be made by MCI to JAMS and by establishing the exchange of extensive *ex parte* communications between MCI and JAMS, the MCI/JAMS Agreement created practices that are not disclosed in the MCI Tariff.

Regulations. By failing to disclose the MCI/JAMS Agreement in the MCI Tariff, MCI created regulations concerning how certain MCI disputes are to be arbitrated by JAMS that are not disclosed in the "Rules and Regulations" section of the MCI Tariff as required by the filed tariff doctrine.

Rather than addressing these substantive issues, MCI erroneously claims that Matrix has waived this issue by failing to raise it before the District Court or the Court of Appeals. This is untrue. Matrix raised the issue before the District Court, in its Reply to Memorandum in Opposition to Defendant's Motion for Relief From Judgement, March 5, 1997, Page 28, as follows:

> [T]he public rate doctrine requires full and complete disclosure of a carrier's rates and regulations. *Payphone Concepts, Inc. v. MCI Telecommunications Corp.* 904 F. Supp. 1202, 1207 (D. Kan. 1995) . . . MCI was not entitled to omit from its Tariff information that it would have preferred remain secret respecting its business relationship with JAMS – and at the same time, require Matrix to be bound by those terms. If such an omission were permitted without consequence, MCI would secure the benefit of the public rate doctrine without enduring its burden of full disclosure.

Matrix also fully addressed the issue of the filed tariff doctrine in its opening Appellate Brief to the Court of Appeals as follows:

> The gravity of this nondisclosure is all the more graphic and alarming since there was no way for Matrix to learn of the undisclosed agreement between JAMS and MCI when one considers the fact that:
>
> a) Section 61.74 of the C.F.R. specifically provides that the MCI Tariff must be an all encompassing document and may not reference any other documents. Thus, there would be no basis for Matrix to think there would be an agreement between MCI and JAMS since its existence would violate the Code of Federal Regulations.
>
> b) Section 203 of the Federal Communications Act, [commonly referred to as the filed tariff doctrine] requires that the MCI Tariff be an all encompassing document that is posted and kept in an open place for inspection. Thus, there would be no basis for Matrix to think there would be an agreement between MCI and JAMS whose existence would be "unlawful" under the terms of the Federal Communications Act. . . .
>
> It is unreasonable to expect Matrix to assume that JAMS and MCI would have a concealed agreement that violates three major provisions of the Federal Communication Act, the Federal Arbitration Act, the Code of Federal Regulations and the Code of Ethics for Arbitrators in Commercial Disputes.

(Matrix's Opening Appellate Brief, June 27, 1997, p. 42).

This case strikes at the very heart of the filed tariff doctrine because it undermines the full disclosure principle that is the cornerstone of all tariff regulated industries

including electric power, natural gas, railroad transportation and, as in this instance, the telecommunications industry.

C. The Tariff's Limitation Of Liability Exception For Willful Misconduct Overrides And Nullifies Any Obligation To Arbitrate

MCI further asserts that the MCI Tariff does not control this dispute between MCI and Matrix. This new argument by MCI directly contradicts MCI's argument before the District Court that this case is subject to the primary jurisdiction of the Federal Communications Commission because it involves a "claim in which tariff is center of controversy." (See footnote on p. 17 of MCI's Surreply in Opposition, March 17, 1997) In fact, MCI has based its entire case on the premise that the MCI Tariff is the controlling document in this dispute. The Tariff is indeed at the center of this controversy because it is the Tariff, as drafted by MCI, that designates JAMS as the arbitration provider but fails to disclose the MCI/JAMS Agreement and it is the MCI Tariff that MCI relies on in its effort to deny Matrix its constitutional and statutory rights and remedies.

MCI ignores the fact that the rules of tariff construction (namely the filed tariff doctrine) expressly prohibit both MCI's failure to disclose the MCI/JAMS Agreement. The Brief by MCI also ignores the fact that over one hundred years ago this Court in *Primrose v. Western Union Telegraph Co.*, 154 U.S. 1 (1894) held that carriers like MCI cannot use their tariffs to limit their liability based on willful misconduct and that Rule B-4.02, which states "MCI's liability for willful misconduct . . . is not limited by this tariff" is an expression of this Court's decision in *Primrose*.

Furthermore, MCI does not dispute the finding in *MCI Telecommunications Corp. v. TCI Mail, Inc.*, 772 F. Supp. 64 (D.R.I. 1991), that "the tariff as a whole" must be considered "otherwise many of the provisions of the MCI

Tariff would be meaningless" but attempts to pigeon-hole the decision as only applying to "rate disputes governed by the tariff." (MCI Brief p. 17) This narrow reading of *TCI* is not supported by the court's decision which states:

> *The entire MCI Tariff must be controlling, including the "willful misconduct clause . . . ".* The MCI Tariff itself does not clearly preclude a contract or tort claims against MCI based on its alleged "willful misconduct". . . . Analysis of the Communications Act of 1934 supports this conclusion.

The court's decision specifically preserves "contract" and "tort" claims like those asserted in Matrix's First Amended Complaint and is not limited to "rate disputes" as MCI suggests. The *TCI* court also found that "[i]f TCI can prove 'willful misconduct' by MCI . . . the MCI Tariff permits recovery for liability arising out of such conduct" and MCI Tariff Rule B-4.02 designates the District Court as the appropriate forum for deciding such disputes. Matrix's First Amended Complaint was in five counts, all of which allege willful misconduct on the part of MCI. As such, Matrix was correct to proceed in Court under its First Amended Complaint.

MCI is attempting to abandon its own tariff because the regulatory scheme that grants tariffs the power of law also contains safeguards that require MCI to disclose the MCI/JAMS Agreement in its publicly filed tariff and expressly preserve Matrix's right to proceed in Court under its First Amended Complaint.

D. There Is A Conflict Between The First And Ninth Circuits

MCI claims that the conflict between the Ninth Circuit's decision in *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir.), cert. denied, 116 S. Ct. 275 (1995), and the First Circuit's opinion in this action "fails because this case does not involve a statute enacted to protect parties in Petitioner's position." This is untrue. In *I.T.T. World*

Communications, Inc., 30 F.C.C.2d 101 (1970), the FCC found that one of the principal functions of the Communications Act is to assure equitable treatment of parties by common carriers, particularly small entities that lack the bargaining power of larger entities. The Communications Act, therefore, operates as a safeguard against the enormous power of multinational telecommunications companies like MCI just as the Petroleum Marketing Protection Act ("PMPA") acts as a safeguard against the enormous power of multinational petroleum companies like ARCO.

Lastly, MCI does not dispute that inherent constitutional and statutory rights are denied Matrix by the MCI Tariff.

III. CONCLUSION

This Court should grant the Writ of Certiorari and hear this case.

Respectfully submitted,

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